Williamhouse of California, Inc. *and* Graphic Communications Union District Council No. 2, Local 388M, Graphic Communications International Union, AFL–CIO. Case 21–CA–27251

May 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On March 29, 1994, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Subsequently, pursuant to a settlement approved by the Regional Office relating to the discharge of Ethel Whittaker, the Respondent withdrew those exceptions and portions of its supporting brief relevant to that discharge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Williamhouse of California, Inc., City of Industry, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to the admission into evidence of two audio tapes of meetings it held with employees. Although some of the testimony regarding the chain of custody of the tapes was initially erroneous, largely owing to one tape being misidentified as the other, we find no evidence of a deliberate fabrication.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] No exceptions were filed to the judge's findings and conclusions that the discipline and permanent layoff of Ernest Garcia and the discharge of Ethel Whittaker violated Sec. 8(a)(1), (3), and (4) of the Act.

Jean C. Libby and *Peter Tovar, Esqs.*, for the General Counsel.
Stephen P. Pepe and *Kari Haugen, Esqs. (O'Melveny & Meyers)*, of Los Angeles, California, for the Respondent.
Bernard L. Sapiro and *Jeff Cuellar*, of Fullerton, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Here the General Counsel of the National Labor Relations Board alleges that Williamhouse of California, Inc. (Respondent or Company), violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act. The Graphic Communications Union, District Council No. 2, Local 388M, Graphic Communications International Union, AFL–CIO (Union), initiated this proceeding by filing the four-captioned unfair labor practice charges between December 18, 1989, and January 29, 1991.[1] The matter is before me pursuant to the second order consolidating cases, amended consolidated complaint, and notice of hearing issued on March 29, 1991, by the Regional Director for Region 21, acting on behalf of the General Counsel. Respondent timely answered the complaint on April 12, 1991, denying that it engaged in the unfair labor practices alleged.

More specifically, the General Counsel alleges Respondent unlawfully: (1) terminated employees Erwin Afre and Ernest Garcia, and constructively discharged Ethel Whittaker; (2) denied overtime opportunities to Whittaker and otherwise reduced her wages; and (3) issued written warnings to Afre and Garcia, all in violation of Section 8(a)(1), (3), and (4). The General Counsel also alleges that Respondent promulgated and enforced a discriminatory rule against talking about union matters on worktime in violation of Section 8(a)(1) and (3).

Additionally, the General Counsel alleges that Respondent's supervisors and agents independently violated Section 8(a)(1) by: (1) creating an impression that union activities were under surveillance; (2) interrogating employees concerning union activities; (3) threatening to discharge employees, reduce benefits, and close the plant; (4) suggesting the futility of employee union activity; and (5) removing certain personal items (including union paraphernalia) from an employee's tool cabinet without the employee's authorization.

Respondent's answer denies the unfair labor practices alleged. In addition, Respondent asserted several affirmative defenses including estoppel, waiver, and untimely reinstatement of charges previously dismissed. Three affirmative defenses pertain to the General Counsel's use of an employee's tape recording of a speech by a management official made without the Company's knowledge or consent. Respondent's affirmative defenses related to the tape recording were, in effect, rejected by my receipt of a copy of the recording in evidence.[2]

[1] If not shown otherwise all further dates refer to the 1990 calendar year.

[2] Initially, I received what purported to be the original of the tape recording referred to in Respondent's affirmative defenses. After discovering that the original had been recorded over, I received a copy of the pertinent recording. In this connection, the Board has held that the lack of consent for recording a conversation is not grounds for rejecting a transcript of the recording. *P*I*E Nationwide*, 282 NLRB 1060, 1062 fn. 5 (1987). Likewise, the constitutional prohibition against unlawful searches and seizures is inapplicable to the receipt in evidence at Board proceedings of recordings that were made by non-Board personnel. *NLRB v. Catalina Yachts*, 679 F.2d 180 (9th Cir. 1982).

I heard this case over the course of 11 days between July 30, 1991, and May 19, 1992, at Los Angeles, California. Having now carefully considered the record, the demeanor of the witnesses while testifying, and the posthearing briefs of the General Counsel and Respondent, I conclude that Respondent violated the Act in certain respects, but not others, based on the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent, a corporation with an office and place of business in City of Industry, California, is engaged in manufacturing envelopes.[3] At relevant times, approximately 200 employees worked at this facility. About 100 employees worked on the day shift, 80 employees worked on the second shift, and around 20 employees worked on the night shift. Historically, Respondent's employees have been unrepresented.

In late October 1989, Darrell Dudik was appointed general manager of the facility and assumed overall responsibility for its operations. He reported to Company Vice President Ed Norton whose office is also located at the City of Industry facility. Between 1982 and approximately September 1989, Greg Thomas served as the plant manager. Thomas was succeeded in early January 1990 by Frank Barrena. Immediately below the plant manager in Respondent's supervisory structure were the production superintendents for the first and second shifts, Arthur Martinez and Marty Goldberg, respectively. In July 1990, Norman Ravenscroft succeeded Martinez as the first-shift production superintendent. A number of department supervisors and working foremen, who will be identified below where relevant, complete Respondent's management and supervisory hierarchy.

Throughout periods pertinent here, the Company maintained and utilized a progressive disciplinary system to aid in enforcing its work and safety rules. Under its system, infractions of the Company's rules are divided into three separate groups based on the severity of the offenses. Conduct in violation of rules in the least serious category are treated initially with a verbal warning. Nevertheless, a written record of a verbal warning is prepared and maintained in the employee's personnel file. A written warning is issued to an offender for any further offense in this category within the next 12 months. A third offense within that period results in a 3-day suspension. An employee is discharged if a fourth offense is committed within the 12-month period following a verbal warning.[4]

In Afre's case, Respondent applied its progressive disciplinary policy strictly and discharged him on the issuance of a fourth disciplinary notice on October 22. The complaint alleges that the first of this series of disciplinary notices, issued on December 11, 1989, was unlawful, but is silent concerning whether the three subsequent disciplinary notices were unlawful.[5] Considerable evidence was adduced, however, perhaps erroneously, concerning all four of Afre's 1989–1990 disciplinary notices leading to his termination. Indeed, it could probably be said that all four notices were fully litigated.

Alluding to the allegedly unlawful December 11 warning, counsel for the General Counsel argues in her brief that had this warning not issued, Afre would not have been discharged on October 22, 1990. Later, however, the General Counsel's brief becomes ambiguous concerning the theory of Afre's case by asserting that it is also noted that the warnings Afre subsequently received, allegedly for poor performance, were issued after Afre was a union observer at the election. Apart from that elliptical statement and an evidentiary summary of the three unalleged 1990 disciplinary notices, the General Counsel's brief contains no other reference to them. As the three subsequent disciplinary notices are not alleged to be unlawful, I have presumed for purposes of this decision that Afre's 1990 disciplinary notices are lawful. Apart from a general reference to those three unalleged disciplinary notices below, no further findings are made with respect to them.

Twice each year, the Company suspends normal production for 1 week to conduct an inventory. One inventory week follows the Christmas holiday and the other inventory week is near the end of June, usually just before the Independence Day holiday. Half of the work force, more or less, is not scheduled for work during those 2 weeks.

In the fall of 1989 the Union commenced an organizing campaign among Respondent's employees. Following preliminary meetings with employees, the Union filed a petition with the NLRB on November 17, 1989. A hearing on the Union's representation petition was held on December 7 and 8, 1989. Alleged discriminatees Afre, Garcia, and Whittaker were subpoenaed to appear at the hearing as witnesses for the Union. Garcia and Whittaker testified at the hearing. Although Afre attended the hearing in compliance with his subpoena he was not called to testify. On January 12, the acting Regional Director for Region 21 issued a decision resolving most preelection issues and directing an election that was conducted the following month.

Prior to the election, Dudik delivered five presentations to the employees dealing with a variety of issues posed by the Union's organizing effort that the Respondent deemed relevant. To minimize the disruption of production, employees were scheduled in groups of 15 to 25 for each separate presentation. The first presentation was held on December 12, 1989, just after the NLRB representation hearing. Three presentations were held in the latter half of January 1990 following the representation decision and the final meeting was

[3] Respondent's direct inflow annually exceeds the dollar volume established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, the exercise of the Board's jurisdiction here is appropriate.

[4] The Company also maintains a distinct attendance policy. This policy also contains a similar progressive disciplinary scheme designed to warn employees about unauthorized absences from, or tardiness for work. The attendance and work rules policies are treated separately so that the more severe disciplinary actions, such as suspension or termination, do not result from a combination of warnings issued under the two separate policies.

[5] The complaint erroneously alleges that the warning was issued on December 14, 1989. That variation is without significance. In addition, the December 11 warning states that it is a written warning. That is also without significance as Afre's subsequent disciplinary notices repeatedly refer to it correctly as a verbal warning.

held in February shortly before the February 7 election. At the election a majority of the employees voted against union representation.

B. *The Preelection 8(a)(1) Issues*

1. The alleged conduct of Arthur Martinez

Concededly, Ethel Whittaker was the leading union advocate among the employees. In mid-October 1989, she set about organizing a Saturday meeting of employees at a local park to discuss rule changes affecting employees.[6] The Union's organizing campaign began shortly thereafter.[7]

Whittaker claims that Production Superintendent Martinez soon learned of the scheduled meeting in the park and spoke to her on several occasions about it. Their first discussion, Whittaker testified, occurred on a Wednesday (apparently October 18, 1989) prior to the scheduled Saturday meeting at her work station. According to Whittaker, Martinez approached and said, ''I understand you're trying to organize a [u]nion meeting.'' Whittaker responded that the meeting was not about a union but only to discuss ''our problems.'' Martinez then asked what the problems were and Whittaker told him that it involved employee dissatisfaction with some new rules. During their ensuing conversation, Whittaker claims that Martinez stated that the plant would never go union and that the employees were not allowed to have a meeting. In a subsequent conversation on Friday, Whittaker said that she ''tried to tell [Martinez] that the [Saturday] meeting had been called off . . . because I didn't feel they would allow us to have the meeting.''

Purportedly, Martinez approached Whittaker on the following Tuesday at her work station and mentioned again that he understood employees were going to have a union meeting. Whittaker reminded him that the meeting had been canceled. She claims that Martinez then asked her who else was involved in trying to get a union and mentioned the names of three employees who, he suspected, were involved in union activity. Whittaker responded that he was ''just guessing'' and that she would ''take all the blame'' but she would not disclose who else was involved. Whittaker asserts that Martinez then told her that the plant would ''never go [u]nion'' and that before ''they go [u]nion, they'll shut the doors.'' After a brief exchange about whether an employer could threaten to close if employees elected union representation, Martinez then asked her why the employees wanted a union. At that time, Whittaker produced a union contract she had in her possession and reviewed benefits provided there with benefits available at the Company. Whittaker said that Martinez concluded this discussion by stating again that the ''plant will never go [u]nion.''

Whittaker asserts that Martinez approached her the very next day at her work station and accused her of bothering employees for their addresses and telephone numbers in connection with a planned union meeting. Whittaker denied the accusation and asserted that she had not left her department. Instead, she claimed that she was conducting all her union activities on her own time. Nonetheless, Martinez told Whittaker that if he would fire anyone, including her, caught engaging in union activity on company time. Whittaker said that Martinez told her again on this occasion that the plant ''will never become union[ized].''

On Saturday thereafter Martinez approached Whittaker and told her that an office employee named Melissa had been terminated the day before because she had been telling employees that ''the Union wasn't a bad idea.'' Martinez told Whittaker that others found ''going around on company time talking about the Union'' would also be fired. Martinez then remarked that he understood that a union meeting was planned. Whittaker said that she shrugged her shoulders and said, ''Maybe we are.'' According to Whittaker a meeting was scheduled for the following day.

The next Monday, Whittaker said that Martinez approached her to ask how the union meeting had gone and how many people attended. Whittaker told him that she did not want to discuss those matters. Martinez then inquired again, according to Whittaker, about the reasons employees felt they needed union representation. After Whittaker articulated several reasons, Martinez told her that even if the Union won an election, it would still have to negotiate and that the Company might not negotiate with the Union. Whittaker challenged that assertion by Martinez and when he, in substance, repeated the claim that the Company might not negotiate, Whittaker told him that, as no petition had been filed yet and the Union had not won an election, she preferred taking things one at a time.

Later the same day, near quitting time, Whittaker said that Martinez approached her again and told her that he was not going to put up with people going around talking about the Union and that if he caught anyone doing so, he or she would be fired. Whittaker claims that she asked Martinez what he would do if he overheard two employees talking about baseball on company time. She said that Martinez told her, ''Well, you can talk about baseball.'' Whittaker then asked, ''But if two people on the other side were talking about a Union meeting, you would fire them?'' To this, Whittaker said Martinez responded, ''Yes. That's different.'' Whittaker said that she told Martinez that she could not see the difference but Martinez simply told her that the Company would never become unionized and that she was wasting her time.

Cutting department employee Steve Sisneros testified that Martinez approached him at his work station the day after a union meeting in November 1989 and engaged him in a conversation that went approximately as follows. After greeting Sisneros, Martinez asked, ''How was the meeting?'' Sisneros responded, ''What meeting?'' and Martinez replied, ''The meeting yesterday.'' After Sisneros denied that he had attended any meeting the previous day, Martinez asked pointedly if he had gone to a union meeting held at a particular hotel in West Covina. Sisneros told Martinez he had not attended the meeting described, which according to Sisneros was the truth.[8]

[6] Earlier that month, Whittaker received a warning under Respondent's attendance policy that she deemed unfair. Although Whittaker never articulated what rules prompted her to schedule this meeting, presumably, this recent warning was a principal motivation.

[7] Other evidence suggests that some general employee discussions concerning unionization occurred as early as April 1989 but there is no indication that these discussions lead to any serious union activity.

[8] Sisneros claims that he later confronted Dudik at one of the company meetings about the foregoing exchange with Martinez and

Continued

Martinez admittedly had several conversations with Whittaker about the Union but he disagreed considerably with her account about the content of their exchanges. In general, Martinez asserted Whittaker approached him on several occasions to ask questions about the Union, a claim which Whittaker denies.

According to Martinez' account, Whittaker asked him what would happen if the Company went Union and he told her that the Company would simply go on with its business doing what it normally did. Martinez specifically denied that he ever told Whittaker that the Company would never go union; that he ever asked anyone if he or she had attended any union meeting; that he ever asked Whittaker how many employees had attended a particular union meeting; that Whittaker ever told him that a meeting had been called off because she felt that he would not allow an employee meeting; that he ever told Whittaker that the plant would close down before it would go union; that he ever told Whittaker that he had fired Melissa because she was telling other employees that the Union was not a bad idea; that he ever told Whittaker that she could not solicit for the Union on her own time; that he ever told Whittaker that other employees would be fired if they talked about the Union on worktime; that he ever told Whittaker that it was okay to talk about baseball on worktime but that talking about the Union on company time was different; that he ever asked Whittaker why she felt employees at the Company needed a union; that he ever told Whittaker that the Company did not have to negotiate with the Union; and that he ever told Whittaker that she was wasting her time because the Company would never become Union.

Martinez also said that he admonished Whittaker several times in the period immediately prior to Thanksgiving 1989 about bothering other employees while at work because he received several complaints from employees concerning Whittaker. According to Martinez, Whittaker admitted that she had talked to some of the complaining employees. He said that he told her she would be subject to disciplinary action if he bothered employees while they were working but he never issued any written warnings to Whittaker about the matter.

Martinez also denied that he questioned Sisneros about attending a union meeting or that he had made mention of a meeting at a West Covina hotel as Sisneros asserted. Martinez testified that he could not recall Sisneros mentioning this incident during the course of a Dudik conducted employee meeting as asserted by Sisneros and Dudik denied Sisneros' claim on this point outright.

2. Dudik's preelection speech

As noted, General Manager Dudik conducted a series of employee meetings prior to the election in which he articulated reasons employees should reject representation by the Union. The meetings were conducted in the employee lunchroom on company time. Both Dudik and the employees who testified concerning the Dudik's speeches said that Dudik utilized an easel with a large tablet of paper on which he would write certain points for emphasis and that the content of Dudik's speeches was simultaneously translated to Spanish for the benefit of employees more conversant in that language.

Whittaker recalled attending one of the meetings in January during which Dudik discussed the Union's income from dues and the salaries of union officials. She said that Dudik also discussed life insurance and pensions. According to Whittaker, Dudik told the assembled group that ''unless you had 10 years, you would lose your pension.'' She said that Dudik then told the employees that ''the day the Union comes in everyone will go down to zero.'' She said that Dudik then wrote a large zero on the tablet of paper.

Afre recalled attending three or four meetings when Dudik discussed the Union. He testified that Dudik held up the union organizing leaflet entitled *Unity* at the first meeting that he attended and pointed to a picture of Garcia, Whittaker, and himself. Purportedly, Dudik then stated, ''You see these people here? They're smiling[.] . . . They're not going to be smiling anymore.''

At the second meeting that he attended, Afre recalled that Dudik spoke about some of the employee benefits at the Company. Afre said that Dudik had a chart showing how much the Company paid a year for employee benefits. He said that Dudik then spoke about the pension and life insurance benefits. Thereafter, according to Afre, Dudik remarked that ''if the Union . . . come[s] in, you going to lose everything'' and that Dudik drew a large zero on the tablet of paper. Afre recalled that the union ''fees'' and the union president's salary were discussed at this meeting.

Afre testified that he recorded a portion of this second meeting. A copy of that recording was ultimately received in evidence over the vigorous objection of Respondent. Dudik's very distinctive voice as well as the voice of the Spanish translator and extemporaneous remarks of other, unknown individuals are recognizable throughout this recording. Initially, Dudik refers to comments he had made at an earlier meeting related to the salaries of union officials and the Union's sources of income, i.e., dues, assessments, and fines. Thereafter, Dudik discussed company-provided employee benefits and their cost. In this portion of the speech Dudik stated:

> I want to show you a part of what this one million dollars is going for. The average benefit to every Williamhouse employee that Williamhouse pays, not counting the employee's portion. Two issues here: The first two items are one hundred percent paid by the Company. The life insurance is not the medical payments being taken out of your pay every week. That's one thing. The life insurance is a totally separate issue. Many employees in the first couple of meetings today were not even aware of this life insurance. And it may be Williamhouse's fault that we have not communicated or talked to you about this benefit.
>
> As a result of our meetings this morning, within a couple of days we're going to get a list of all the general benefits that Williamhouse has to offer you. And if you have questions about it when you get the letter we'll probably give it to you next week I really encourage all of you to ask about the benefits.
>
> Most union plans, and I've read the contracts, they offer a two thousand dollar life insurance. William-

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similar claims made by other employees. While he was speaking to this point, Martinez was shaking his head back negatively, but never verbally responded to his assertions. Dudik replied that he could not do anything about the accusation because it would be Sisneros' word against Martinez' word.

house, for all those employees that are not members of the union . . . gives each employee a life insurance of twice their annual salary. If an employee makes fifteen thousand dollars a year, they have a life insurance right now of thirty thousand dollars a year. Those employees who are carrying life insurance outside the company, its very costly to them. The Company also offers your children's life insurance for every five thousand dollars in coverage costs the employee one dollar per month. It's much, much cheaper than any insurance rate outside the Company.

The pension plan: All members of Williamhouse are entitled to the pension plan. From the day you begin work at Williamhouse, Williamhouse contributes to a pension fund in your name. In five years of employment you're eligible for the pension. For your money for the money that's contributed for your behalf from Williamhouse is put into a special fund. In ten years, all employees that have been here for ten years are eligible for the pension plan.

Now, the union pension plans, the union life insurance, if they get paid through the union dues, you're not getting your full dollar's worth on that. A part of your union dues may go to the pension plan, but the balance of your union dues goes towards the salaries that we talked about earlier.

I know we've got some long term employees in this room. And the big question is what happens to all the time they've put in if the Union gets here. If you have at least tens years in the Company, you won't lose your ten years or any other amount above ten years. But when—*if the Union comes in, the pension plan and the life insurance stop the day they come in. While the employees over ten years keep the rights that they gained beyond ten years everybody starts back at ground zero. So the higher you are the better it is because if you go from fifteen years to sixteen years it's much, much better than if you go from fifteen years and then start back again at one. It's going to take you a long time to get back to that fifteen year level. So rather than the benefits accumulating, which is in the best interests of everybody, it stops.*

I think you owe it to yourselves and to your family to really consider even this little type of item in coming weeks. *If the Union comes in, if they win the election, as of that day the life insurance, the pension plan, and all of your wages right now—here's what they are—everything from your hourly wage to your life insurance benefits, to your pension plans, everything that's accumulated to this point is gone*. It's all based on what the new agreement is between the Company and the Union. The Union cannot guarantee that you'll make the same wages or get the same benefits. Even though they say they promise they can not guarantee. I don't think we can afford this. I think its very, very risky and I think the employees could take a big step back if the Union comes into this plant. [Emphasis added.]

Dudik denied that he told employees that if the Union comes in everything stops. On the subject of pensions, Dudik testified as follows:

Q. What, if anything did you tell the employees in these meetings you had regarding the subject of pensions?

A. In the meeting—the last meeting we held within the departments related to the—it was a combination of the collective bargaining process and also the issue of a strike. I had informed the employees on the one hand on the collective bargaining process that if the Union was elected to come into the plant *and a pension plan was chosen other than the one that we currently had, then employees that would not have been vested in the current Williamhouse plan would lose the time that they had put in up to that point without being vested. We had mentioned that those employees that would be vested would retain those vesting rights in addition to again being—beginning a—new with a new plan*. In the area that we—had discussed the matter of strikes, we had I had mentioned that in the event of a strike situation, those employees not working and would be involved in the strike would lose any time accrued towards their pension while they were out on strike, that only time earned for pension was while they were on the job, not while they were or would be on strike in the event that there was a strike called.

Q. Did you ever say in any of these meetings that if the Union came in, everything would look like this, and draw a big zero on a clipboard or flip chart?

A. No. [Emphasis added.]

C. *The 8(a)(4), (3), and (1) Allegations*

1. Ernest Garcia

a. *Garcia's employment background*

Prior to his employment with Respondent, Garcia worked for two other envelope manufacturers in the Los Angeles area as an adjuster on the wide range folding machines. Garcia applied for an machine adjuster position at the Company in December 1988 but was hired as a wide range folding machine operator in January 1989 because no adjuster positions were available at the time. According to Garcia, Martinez led him to believe when he was hired that an adjuster position would be available soon, perhaps in a couple of weeks.

As it turned out, however, Garcia worked as an operator until early October when he was promoted to an adjuster's position on the medium openend (MO) envelope machines.[9] At the time, Garcia was transferred from the night shift to the day shift but, he claims, Martinez told him that he would be transferred to the afternoon shift later when one of the adjusters on that shift was assigned to the new 247 machine, a highspeed, German-made folding machine that was about to be installed at the plant. Department Foreman DiFatta told Garcia that he was being trained to replace Ruben Pena, an adjuster who planned to retire soon.

When Garcia received his first paycheck after becoming an adjuster, he noticed that he continued to receive an operator's pay rate, less the shift differential, which meant that he was earning less than he had as an operator. Following his

[9] The Company's payroll change notice record reflects that Garcia was promoted to the adjuster position on October 10, 1989. This record notes that Garcia's record was excellent.

initial complaints to Martinez that produced no results, Garcia met with Dudik, who only recently had become the general manager. Dudik promised to consider Garcia's request for an increase to $12 an hour. A couple of weeks later after buttonholing Dudik on the plant floor to remind him of the matter Garcia was called to Dudik's office where he was informed that his hourly rate would be increased to $10.32, which was about $1.50 per hour more than his operator's rate. According to Garcia, Dudik told him that his new rate was right in the middle of the MO adjusters' scale.[10]

b. *Garcia's union activity*

Garcia testified that he first became involved in the union campaign about the time that he received his pay increase. He signed a union authorization card given to him by Whittaker and attended a union meeting at a hotel near the plant. At the meeting he agreed to solicit for the Union among the employees on the night shift because he was familiar with those employees. Later, he distributed cards and brochures to the night-shift employees. Martinez admitted that he received reports about this activity by Garcia from other employees.

As previously noted, Garcia was subpoenaed by the Union to attend and testify at the representation case hearing on Friday, December 8, 1989. The substance of his testimony concerned the supervisory status of DiFatta, his foreman. Garcia obtained permission to be absent for the hearing from Martinez.

The Monday following the hearing, Garcia went to work wearing a ''Vote Yes'' button on his shirt.[11] In addition, Garcia stuck a union bumper sticker bearing the slogan ''Live better. Work Union'' on the inside of his tool, and placed a number of union pamphlets inside his toolbox, which he left open near his work area. Garcia asserts that his toolbox was situated so that anyone passing by could easily observe the union materials. He claims that Martinez looked directly in his toolbox that morning, and that Norton and Dudik passed by his open toolbox during tours they made through the plant that week. Admittedly, however, no supervisor or manager ever spoke to him about his open display of union materials.

Garcia attended one Dudik conducted employee meeting concerning the Union.[12] He claims that he challenged several statements made by Dudik during the course of the meeting. For example, when Dudik told the employees that they did not have to vote for the Union even if they had signed a union card, he asked Dudik if it was true that employees could vote for the union even if they had not signed a union card. Later, Dudik told the employees that if they wanted to work in a union shop, they should go to a union shop, Garcia responded that was like telling Czechoslovakians that if they wanted to be free they should go to a free country.[13] Garcia recalled that Dudik eventually became visibly irritated with him and ceased responding to his remarks.

c. *Garcia's December 14 verbal warning*

During the course of the week following the hearing, Garcia had a series of conversations with Maria Guzman, a box machine operator, about her failure to receive a regularly scheduled pay increase evaluation. Because of his own experience, Garcia urged Guzman to speak with Dudik about the matter but Guzman was reluctant to do so. Finally, during the morning break on December 14, Garcia volunteered to talk with Dudik on Guzman's behalf and Guzman told him, ''Okay, fine.''

At the time of his afternoon break, Garcia observed Guzman speaking with another box machine operator in the vicinity of, but away from, the box machines they normally operate. Both operators were on worktime. Garcia approached them to ask Guzman when she was hired and the amount of her current pay rate. As Guzman responded, Garcia jotted the information down on a note pad.

Martinez obviously observed them talking together and, by Garcia's account, ''came running up'' to ask what they were doing. Martinez also attempted to grab at the note pad in Garcia's hand and asked, ''What have you got there?'' Garcia explained to Martinez that they were talking about Guzman's pay. Martinez then told him: ''[I]t's none or your business how much she makes. You leave that to Darrell and me.'' In response, Garcia asked, ''What, we can't talk about how much we make now?'' Martinez repeated that was none of Garcia's business and ordered Garcia back to his area. Garcia argued that he was on his break, and chided Martinez by telling him, ''We weren't even talking about the Union.'' Martinez then told Garcia that he was not supposed to be talking to Guzman when she was working and added that ''[f]rom now on I want you to take your breaks in the lunchroom or outside.'' Near the end of their exchange, Garcia claims that Martinez pointed at the union button he was wearing and stated, ''I told you people to stop bothering my people.''

Guzman testified that on this particular occasion she was getting material from a pallet located between the two box machines to put in her machine and that she was speaking with the other box machine operator at the time. While she was so engaged Garcia approached her to ask what she was earning because he said he was going to talk to Darrell to help her. Guzman said that she did not talk to Garcia much and that when Martinez approached, he took Garcia away so that she did not overhear what was said between them. Guzman testified that employees are not permitted to talk to each other when they are working but she did not get in any trouble for talking with Garcia on this occasion.

Martinez claimed that he observed Garcia with a pencil and pad in his hand talking to Guzman on this occasion while she was at work on her machine. Martinez denied that he ran over to Garcia when he observed the two employees talking but that he did walk up to Garcia and asked what he was doing. After Garcia told him that he was asking Guzman for some information about her wage, he told Garcia that she

[10] The Company's payroll change notice record reflects that Martinez authorized Garcia's pay increase on November 6 and that Dudik approved that action on November 9.

[11] According to Garcia, the button was about 3-1/2 inches in diameter.

[12] According to a position statement submitted by Respondent's counsel to the NLRB's Regional Office during the course of the investigation concerning the charges filed with respect to Garcia, this meeting took place on December 12, 1989.

[13] According to Dudik, one employee did raise a question about wanting to work in a union shop. He claims that he responded by saying that if they wanted to work in a union shop they had the right and option to apply for a job in a union shop. Dudik said, however, that he did not remember Garcia's Czechoslovakian remark.

was working, and that he was not to interfere while she was working. Martinez denied that he attempted to grab Garcia's note pad. Instead, he claims that Garcia showed him the note pad that contained a list of names. Martinez claimed that Garcia had been walking around asking certain employees what they were making and that he told Garcia he could do that on break or outside the plant but not while the employees were working.

Later in the afternoon of December 14, Foreman DiFatta took Garcia to Dudik's office. When they arrived there, Dudik and Martinez were already present. At that time, Martinez told Garcia that he was being written up for violating a plant rule prohibiting employees on break from talking with employees who were still at work. Martinez then handed a disciplinary notice to Garcia and told him to sign it. After reviewing the document, Garcia asked to see the plant rule cited in the notice and Martinez provided him with a document containing the rule.

After Garcia read the rule, he argued that he had not violated the rule because Guzman and the other box machine operator were not working at the time; instead, Garcia claimed the two operators were talking to each other at the time he approached them. Consequently, Garcia insisted on including his own account in the section of the warning record provided for that purpose. According to Garcia, he first thought for a few moments concerning his statement and then began to write. He asserts that while engaged in this process, Dudik and Martinez began jiving him; thus, Garcia claims that Dudik asked whether he was sure he had enough ink in his pen and Martinez asked if he was writing a book. When Garcia completed his statement, he signed it, and was then given a copy of the disciplinary notice.

Martinez testified that he told Garcia he was being given a verbal warning for interfering with an employee while the employee was working that could cause a serious hazard for the other employee. Although not entirely certain, Martinez thought Garcia had disputed the fact that Guzman was at her machine when he spoke to her. Martinez specifically denied that the warning had anything to do with the fact that Garcia had testified at the NLRB hearing or Garcia's union activities.

Garcia's December 14 warning reflects that the incident occurred on that date at 12:20 p.m. in hand box two. The infraction listed is a violation of plant rule B2, and Martinez' written account notes that the action taken constituted a verbal warning, that the next occurrence will result in a written warning, and that further occurrences thereafter will result in a 3-day suspension and, thereafter, by discharge. Insofar as is known, the December 14 warning was the only disciplinary action taken against Garcia during his tenure at the Company.

The applicable rules relied on to justify Garcia's warning were issued at some unspecified time in the past by former Plant Manager Greg Thomas in the form of an interoffice written communication to all employees. As described in that document, plant rule B2 provides:

> B) *Break and Lunch Periods.*
>
> . . . .
>
> 2. When on a break or lunch period, you cannot go to another person's work area who is still working. It can cause a distraction and could easily result in an accident.

At the end of his two-page communication, Thomas warns: ''If these rules are not followed, your department foreman or supervisor will be discussing any problem with you, and if anyone has a *chronic* problem, your department foreman will take disciplinary action.'' (Emphasis added.)

d. *Garcia's permanent layoff of December 15*

Near the conclusion of the following day, DiFatta told Garcia that Martinez wanted to speak with him again. Enroute to the office area, the two encountered Martinez who led them into Maintenance Supervisor Mark Genera's office. There, in the presence of Genera and DiFatta, Martinez told Garcia that the prospects for envelope orders on his machine were down and did not look good for next quarter. Martinez went on to tell Garcia that he was being permanently laid off and that he would not be subject to recall. Garcia claims that Martinez emphasized the statement that his layoff would be permanent and that he would not be recalled. After he was handed checks for his work to date and accumulated vacation time, Garcia remarked, ''You know that's not why I'm being fired.'' He testified that Martinez replied, ''It's out of my hands. We're even canceling the order for the new machine.'' After another passing remark by Garcia, the exchange ended and Martinez instructed DiFatta and Genera to check out Garcia's toolbox for company property. When that task was completed, the two supervisors escorted Garcia to the exit.

Dudik testified that he made the decision to lay off Garcia and that the layoff was for economic reasons. According to Dudik, business conditions for the coming months did not appear to be fantastic primarily because one of the Company's larger customers began making its own envelopes. In addition, Dudik testified that the decision was influenced by the fact that Pena did not retire at the end of 1989 as he had originally planned.[14] For these two reasons, Dudik felt the department was overstaffed. Accordingly, as Garcia was the least senior and the least skilled of the Company's open-end adjusters, Dudik selected Garcia for layoff. No consideration was given to returning Garcia to his former position as a machine operator because, according to Dudik, the Company's layoff policy did not provide for bumping in layoff situations. Dudik assigned Martinez to lay Garcia off and instructed Martinez to tell Garcia that the layoff would be permanent.

No other employees were laid off in the open-end department at this time. Likewise, no evidence shows that the Company typically laid excess workers off permanently. On the contrary, Respondent maintains a written layoff and recall policy that provides that employees are eligible for recall within 6 months following the date of their layoff. That policy also provides:

> Employees generally will be recalled from layoff based upon the Company's need for an employee's

[14] Pena retired in March 1990. By Pena's account, he had originally planned to retire when he was 65 but changed his mind and stuck it out another year until he was 66 in order to pay off his debt on a motor home before retirement.

> services and the employee's relative skills, abilities and utility to the Company. Where all other factors are equal, length of service shall be considered.

The Company admittedly hired other adjusters and machine operators throughout the first 6 months of 1990. By way of explanation for the Company's failure to recall Garcia for any of the machine operator positions, Dudik testified that laid-off employees are only considered for recall to the department from which they were laid-off. Plant Manager Barrena acknowledged that open-end operators were hired in 1990 but no explanation was provided by him about why Garcia was not considered for recall to an operator's position.

Likewise, Dudik testified that Garcia was not considered for the adjuster opening that occurred because the Company required more experienced open-end adjusters. Plant Manager Barrena testified that he interviewed and hired two adjusters, Frank Ortiz and Jack Daust, in the first 6 months of 1990. Both, according to Barrena, were more experienced adjusters than Garcia. Daust's application fully supports Barrena's assertion. It reflects that he began his employment in the industry in 1952 as an adjuster and worked continuously thereafter in progressively responsible positions.

Ortiz' credentials are less certain. He applied for employment with Respondent on February 2 and was hired on March 5. Although his application reflects that he was seeking a position as an adjuster and that he had 4 years' experience with Westavco, one of Respondent's competitors, Ortiz did not describe his adjuster experience on his February 2 employment application. Barrena testified, however, that Ortiz informed him that he had worked as a 249 operator and adjuster while at Westavco and that he corroborated Ortiz' Westavco background with Art Flores, one of Respondent's high speed adjusters, and Martinez, both of whom had worked with Ortiz at Westavco. Flores did not testify and this matter was not raised with Martinez when he testified.

According to Barrena, Ortiz worked on the 249 for a couple of years. Barrena made a note on Ortiz' employment application that Ortiz would be ''[t]emporary on days [t]rain on 249 [b]ased on prior experience.'' Barrena explained that this note referred to the fact that Ortiz would receive additional training on the 249 because every 249 is different and that he would then take over the 249 on the second shift. A subsequent payroll change notice prepared at the end of Ortiz' 90-day probationary period reflects that his starting rate with Respondent was $9.99 per hour. That same document also states that he ''would continue on 249 plus improve and learn MO-web.''[15]

In connection with another matter, Respondent established that it had posted an opening for a high speed adjuster trainee on December 6 that contained a closing date of December 12. Nothing in that posting suggests that prior experience as an adjuster of any sort was required.[16]

[15] Dudik testified that the Company planned to assign Foreman DiFatta as the adjuster on the 249 machine that went into operation in February because he was the most experienced of the Company's adjusters.

[16] The Company also hired two additional adjusters in 1991. Barrena explained that Garcia was not considered because he was no longer eligible for recall.

2. Ethel Whittaker

a. *Whittaker's employment background*

Whittaker worked at virtually all times since 1954 for various companies in the envelope manufacturing industry. She was employed by Respondent in late September 1981. Her employment application reflects a broad experience as a machine operator in the industry, and that she applied for, and was hired as a machine operator by Respondent.[17] Former Plant Manager Thomas described Whittaker as a fully qualified machine operator and explained that she was, accordingly, always paid as a machine operator.

At times relevant here, Whittaker worked on the day shift primarily in the clasp department. DiFatta served as the foreman of both the clasp and the adjacent open-end departments. By her account, Whittaker's duties included the operation of clasp machines and the box machines, training new clasp machine operators, labeling boxes, and relieving machine operators on the envelope folding machines. Company records disclose that in mid-1989, Whittaker's hourly pay rate was increased to $8.77. Dudik testified that the top hourly rates for other clasp department employees was approximately $5 to $5.25.

Although Whittaker perceived herself to be a lead lady, she was never referred to as such by any management official until shortly before the representation case hearing. Dudik testified, however, that when he arrived in late October 1989 Whittaker was the lead person in the clasp department. Former Plant Manager Thomas, who left Respondent's employ sometime in October 1989, testified that Whittaker was neither a lead lady nor a working foreman during his tenure as the plant manager.[18]

Whittaker testified that she had no authority in connection with the hiring or termination of employees and that she could not discipline employees. She did state, however, that on occasion she would be told by DiFatta that the Company needed a certain number of girls to work overtime and that she would seek volunteers in order of seniority as she had been instructed to do by Thomas.

b. *Whittaker's union activity*

During her employment elsewhere, Whittaker had been a member of the Union. At the Company, she was an early and leading union advocate among Respondent's employees. Before the Union was contacted about organizing, Whittaker scheduled a meeting of employees at a local park to discuss the rules and what was going on in the plant. As detailed above, Whittaker claims that this preliminary activity led to several conversations with Martinez.

Whittaker attended the first meeting that the Union held with employees. Subsequently, Whittaker claims that she so-

[17] As used here, the term machine operator refers to folding machine operators. The claim by Whittaker and Thomas that she was initially hired as a machine operator is supported by the fact that Whittaker's 1981 employment application—prepared at a time when her surname was Neary—reflects that her 1981 starting rate of pay was $6.94 per hour (see G.C. Exh. 28), which is about $1.70 per hour more than the top 1990 pay rate for clasp machine operators.

[18] In his testimony, Thomas never stated when his employment at the Company ended. His signature dated October 9, 1989, however, appears on the payroll change notice (R. Exh. 46) promoting Garcia from machine operator to adjuster.

licited cards for the Union and attended other union meetings. Irene Dalrymple described Whittaker as the main employee union organizer in the plant and the Company seems to have perceived her as such.

During one of Dudik's talks to employees concerning the Union, Whittaker claims that she spoke up to dispute his statement about the Union's strike benefits. At a subsequent company meeting, Whittaker made an attempt to record Dudik's speech to the employees as Afre had done at an earlier meeting.[19]

The Union subpoenaed Whittaker for the representation case hearing. She testified at the hearing ''mostly to prove that I was indeed not a supervisor.''[20] At the election, Whittaker was designated by the Union as one of its election observers.

c. *Whittaker's overtime claims*

Whittaker asserts that she frequently worked overtime during the regular workweek and on Saturdays. Although her shift was scheduled to end at 3:30 p.m., Whittaker testified that ''[s]ometimes I wouldn't get out of there until 6:00, 6:30, 7:00.'' Whittaker conceded that the first quarter was typically the slowest period in terms of the availability of overtime but she claims to have worked almost every Saturday for about 8 months out of the year over the course her employment with the Company.

The Company's 1989 employee earnings record for Whittaker reflects that in the first quarter she worked 10.25 hours of overtime, including one Saturday; in the second quarter she worked 29.50 overtime hours, including two Saturdays; in the third quarter she worked 13.50 overtime hours, including two Saturdays; and in the fourth quarter she worked 83.75 overtime hours, including nine Saturdays.[21] In the 10 weeks following October 18—the approximate date on which Whittaker claims that Martinez first spoke to her about the Union Whittaker worked seven Saturdays. Two of the three remaining Saturdays in this period followed the Thanksgiving and Christmas holidays. Thus, exactly half of the Saturdays worked by Whittaker in 1989 occurred after the Company was shown to have been aware of her union activities and sympathies.

Whittaker admittedly did not work the Saturday during the Company's payroll period ending December 2, 1989, the only Saturday she did not work following October 16 other than those following the two aforementioned holidays. With respect to December 2, there is agreement that Shipping Department Supervisor Bartlett asked Whittaker to work even that Saturday and that Whittaker agreed to do so. Shortly thereafter, Martinez countermanded this arrangement. Martinez explained that he did so because he learned that Bartlett had failed to follow company policy requiring that overtime be offered first to employees in the department requiring overtime work. According to Martinez, when Bartlett did so, enough of the shipping department employees volunteered to cover the available overtime for that particular Saturday. Martinez also explained that the employees in that department were paid substantially less than Whittaker so it was more economical to use the department employees. Martinez denied that his action in this instance had anything to do with Whittaker's union activity.

In addition, Whittaker asserted that she was always asked to work inventory week and usually did so except for those occasions when she chose to take her vacation. Whittaker's timecards, however, from December 1988 to January 1990 reflect that she did not work any of the three inventory weeks that occurred in that period. Apart from her general explanation that she, on occasion, voluntarily chose to take vacation time rather than working, no evidence was adduced to show why she did not work inventory in December 1988 and June 1989.

Admittedly, Whittaker was not asked to work the December 1989 inventory week. Martinez testified that practically no production work is done at this time. He said that most of the work performed involved mainly the inventory of finished goods. Martinez asserted that Whittaker did not possess the same skills as those selected for the December 1989 inventory. He explained that the operators who produced the finished goods were the principal employees selected for work during this particular inventory week as they were most familiar with the finished product and the nomenclature used to describe various items.[22] Martinez denied that the failure to use Whittaker for this inventory had anything to do with her union activity or because she testified at the representation hearing.

d. *The end of Whittaker's employment*

Some time in late January, Dudik reached a decision to consolidate a variety of independent operations in the plant, including the clasp department, into a single department to be known as the auxiliary department.[23] On March 5 Barrena and Dudik met with Whittaker and offered her the position of foreperson in the new auxiliary department. According to Dudik, Barrena explained the consolidation and their offer to promote Whittaker.

Barrena told Whittaker that she was ''the most suitable, the most qualified person, and that we wanted her to take

[19] This effort led to the destruction of the original recording made by Afre. As later disclosed, Union Agent David Grabhorn provided Whittaker with a tape recorder and, unwisely, Afre's tape. Whittaker was able to tape a portion of Dudik's speech over the material Afre had recorded.

[20] In his Decision and Direction of Election, the acting Regional Director found that Whittaker ''appears to function as a lead person in her department,'' but concluded that ''there is not sufficient evidence to make a determination as to whether she possesses any of the indicia of supervisory status set forth in Sec. 2(11) of the Act.'' Because of conflicting evidence about whether Whittaker possessed authority to grant overtime, assign or transfer employees, and recommend merit increases for employees, the acting Regional Director concluded that Whittaker would have to vote in the election by challenged ballot. No claim is made in this proceeding that Whittaker was a supervisor within the meaning of the Act.

[21] This finding is based Whittaker's 1989 employee earnings record (G.C. Exh. 27) and on her timecards for the 1989 calendar year (G.C. Exh. 5 and R. Exhs. 1 and 8). Whittaker's employee earnings record shows that the Company's payroll quarters do not exactly tract the yearly calendar quarters.

[22] Martinez alluded to a signup sheet for volunteers to work during inventory week. No one else mentioned that procedure and no such document was offered in evidence.

[23] The other operations included the hand box machines, the automatic box machines, the label machines, and the string and button operation.

over the role.'' Whittaker asked for a day or two to think it over and she was granted that accommodation. According to Barrena, Whittaker was informed that if she did not take the job, it would be offered to someone else and she would revert to a clasp operator. He could not recall if, in this connection, he made reference to the fact that she would then be paid the clasp operators rate or whether he specifically told her that, as a clasp operator, her hourly pay rate would be $5.25 but, he testified, ''it was one or the other.'' Barrena remembered that Whittaker alluded to the fact that she was a qualified folding machine operator during this conversation and that he responded by saying that she had not been a machine operator while she worked for the Company but, if a bid was posted for that job, she could bid on it.

Whittaker said that she was surprised by the March 5 offer. Although Whittaker said that she was told she would be paid as a working foreperson if she accepted the position she emphatically denied that she was ever told what her wages would be cut if she did not accept the foreperson's slot. During her meeting with Barrena and Dudik, Whittaker bluntly explained that she ''couldn't feel that [they] possibly would have my best interest at heart'' and went on to detail many of the unfair actions she felt had been directed at her in recent months, including the claim made at the representation hearing that she was a supervisor. For these reasons, Whittaker told the two managers that the only way she could interpret the offer was that they wanted to fire her and she would not be protected by the law. She said that Barrena denied that ulterior motive and pressed her for an answer to the offer. Admittedly, Whittaker did not respond to the offer until 2 days later.

The following day Whittaker remained at home to formulate a written response and then reported for work on March 7. That morning she met with Barrena and Dudik, and handed Barrena the letter. Barrena read the letter aloud. In the letter, Whittaker accused Martinez of harassing and threatening her because of her union activities. She also accused the Company of denying her overtime and inventory work following the NLRB representation hearing. In essence, Whittaker declined the foreperson's position because she felt she needed the legal protection accorded employees that she would not have as a supervisor.

In the course of her letter, Whittaker also alluded to her good reputation as a worker at every shop where she had worked. She asserted that she had always felt that she had to be better than anyone else because of her handicap.[24] She called attention to her ability to produce on the clasp machine at levels ''which no one else has seldon [sic] done anymore'' and claimed that she was able to run the ''string & button, folding, M.O., etc.'' At the conclusion of her letter, Whittaker asserted that she could ''run any machine in this plant'' and offered to run the ''clasp machine, string & button are [sic] anything or machine'' because she wanted ''things they way they ust [sic] to be peace.''

Whittaker claims that little was said after Barrena read the letter. Barrena agrees that Whittaker declined the position but he asserts that she was told again that if she did not accept the position she would ''have to revert back to a Clasp Machine Operator.'' Barrena says that Dudik ''reiterated'' that her pay would be that of a clasp machine operator and the foreperson's position would be offered to someone else. Barrena could not recall whether Dudik referred to the clasp machine operator's rate or the specific rate of $5.25 per hour. Dudik said that Whittaker was told ''that she would go back to a Machine Clasp Operator rate.''

Both Barrena and Dudik claim that a memorandum summarizing the March 5 and 7 meetings with Whittaker was prepared for her personnel file. That memorandum, signed by both Barrena and Dudik, recites that Whittaker was informed on March 5 that if she did not accept the new foreperson's position, she would ''revert back to the Clasp Operator's position and the top pay rate of $5.25/hour.'' It also recites that when Whittaker ''asked if she could be a Folding Machine Operator, she was informed that she had the right to bid for the position when posted and would be considered on the basis of seniority and ability to perform and the required duties.'' Barrena and Dudik each claimed to have prepared the memorandum.

At some point on March 7 Barrena and Dudik signed a payroll change notice for Whittaker, which reflects her demotion effective March 12 from ''Clasp Lead Person'' to ''Clasp Aux. Operator,'' based on a reevaluation of her existing job. The notice provides that her hourly pay rate was to change from $8.77 to $5.25, a 40-percent pay reduction. This new hourly rate was approximately $1.70 below the hourly rate Whittaker received when she initially started with the Company almost 9 years before.

According to Barrena, the new foreperson's position was offered to Chuck Logan, a working foreman in the shipping department, on March 8. He accepted the job and apparently assumed his new duties shortly thereafter.

According to Whittaker, she returned to work after meeting with Barrena and Dudik on March 7. For the past several weeks, Whittaker claims, she had been assigned by DiFatta to relieve the medium openend folding machine operators for their break and lunch periods. When the time came to relieve on March 7, Whittaker said that she was intercepted enroute to the MO machines by Martinez who told her that she could no longer relieve on the MO machines. When she told Martinez that the machines would have to be shut down, he responded, ''[T]hose are my orders.''

Whittaker testified that she then went to Foreman DiFatta and told him what had happened. She said that DiFatta was angry and ran over to Martinez. When he returned, Whittaker says that DiFatta told her that he did not know what was going on and that: ''They'd rather shut down the machines than let you relieve. There's something very wrong.'' Whittaker testified that DiFatta then said that it would not surprise him if ''they'' next try to cut her pay. After Whittaker argued that they couldn't do that, DiFatta told her: ''I hope you're right.''

Martinez did not testify concerning the foregoing incident specifically but he did claim that Whittaker never served as a relief operator on the folding machines. Dudik too asserted that he never observed Whittaker operating the folding machines, that he never knew that she served as a relief operator on the folding machines, or that she was capable of operating the folding machines. Barrena testified that he was, however, ''told that she did [relieve operators] on some ma-

[24] For a number of years in her youth, Whittaker suffered from a total hearing impairment that eventually was surgically remedied. In addition, she was born with a soft palate condition that hampers the clarity of her speech.

chines,'' and that Whittaker had stated during the March 5 or 7 meeting that she had run the MO and LO folding machines. Thomas testified that Whittaker would '' occasionally . . . relieve on regular envelope folding machines, when I had an absence problem or anything like that.'' According to Thomas, she was ''qualified to do all that.'' DiFatta did not testify at all.

The Company posted bids for folding machine operator trainees and for experienced folding machine operators on March 6. The trainee posting provided that the training and/or the shift would be either second or third. Among the qualifications listed were the ability to be trained by inhouse personnel. The other posting was specifically directed to experienced folding machine operators ''on 2nd and 3rd Shift Only.'' The posting was for folding machine operator positions on the day shift.

Whittaker signed neither posting. When cross-examined, Whittaker explained that she did not sign the trainee posting because she was already a qualified machine operator. Although not specifically confronted with the other posting directed to second- and third-shift operators, Whittaker acknowledged that she did not sign any posting because she had already given Barrena and Dudik a letter asking for a machine.

Dudik testified in essence that Whittaker was not transferred to a folding machine operator position because she did not sign the posting for that position. According to Martinez, however, employees did not necessarily have to sign a job posting to be considered for the posted position. He testified that merely a piece of paper from the employee expressing interest in the posted position would be sufficient to trigger an interview for the posted position. Barrena too acknowledged that employees did not necessarily have to sign a posting itself. In agreement with Martinez, Barrena said that a note from either the employee or the employee's supervisor indicating the employee's interest in the position would be considered sufficient. When Barrena identified the exhibit, which constituted the posting directed to the second- and third-shift operators, he noted an attachment from the second-shift supervisor stating that certain employees were interested in the position.

Moreover, Barrena claims that in the meetings with Whittaker about the foreperson's position, Whittaker was told—after she made claims about being a folding machine operator—that ''she could sign the bid sheet, and with her experience and her seniority, she would most likely get the job.'' According to Barrena, Whittaker had more seniority and was more qualified than all the employees who were considered to have signed the bid form pertaining to the first-shift operator's position.

Employees are paid on Wednesday for the prior week's work. Hence, Whittaker received her first paycheck reflecting the $5.25 rate on March 21. When Whittaker opened her pay envelope and discovered the new rate, she initially thought a mistake had been made so she went to the office and spoke with Michelle Loung, the payroll clerk, and pointed out the rate change. According to Whittaker, Loung, who looked like she had tears in her eyes, told her: ''They told me that's what you were going to make from now on. I'm sorry.'' Loung testified about other matters but not this incident.

Whittaker said she then began to shake severely. She asked to speak first with Norton and then Dudik but was told that Norton was not in and that Dudik was busy. She testified that she then attempted to find Barrena but before she was able to locate him, her shaking became uncontrollable and she began crying. Shortly thereafter, she collapsed and fell unconscious.

An emergency medical team was summoned to the plant and revived Whittaker.[25] The paramedics offered to take Whittaker to a hospital but she declined after Barrena offered to speak with her. Whittaker was taken to an office where she spoke with Barrena and Dudik. Her account of that conversation is as follows:

> A. I told them I didn't want that check. They didn't tell me that all I was going to make—I worked eight days and didn't know. And I swear, they didn't tell me.
>
> Q. Mmm—hmm. [Affirmative response.] And what happened?
>
> A. And they said it was my money, and I told them I didn't want it, and then I told them I'd keep it but only as evidence, and I didn't believe what they were doing was right. I didn't believe what they were doing was right. I didn't believe they could take something that was promised 10 years age [sic] when I was hired, something that I had always gotten, something that I've always had all my life. You don't take 38 years away of money that I've worked hard and learned to run every machine and learned to run that business and learned everything there is, and I had two more years before I retire, and they tell you you're going to work for $5.25 an hour. If anybody in this courtroom can say that this is justice, I want them to stand.
>
> Q. Mmm—hmm. [Affirmative response.] What else did you tell Frank?
>
> A. I begged him. I pleaded with him. I told him not to do that to me. I told him I'd take any machine there was, any machine. I told him that I would lose my home, that you can't suddenly cut me down to $5.25 an hour, when I hadn't made that little money since 1962. I had borrowed a lot of money on my home just two years before to do some remodeling. I used what I based on my living on what I had earned all my life. You can't suddenly decide I have two more years to go or five more years if I'm able to work till I'm 55 (ph.) and I'll be 60 (ph.) next month. You can't just take—say, ''Now you have to work for $5.25 an hour.'' I'll lose my home. I'll sell my home. I told them, ''If you'll let me stay and work till I retire, just don't take my money away from me.'' And I cried, and I pleaded.
>
> Q. Did they say anything?
>
> A. They said they would think about it, and I was too upset. They would drive me home, to pull myself together, and they would have something worked out for me the next morning when I went in.

Dudik testified that Whittaker was visibly upset at this meeting. During the meeting, he said that it was explained to Whittaker that during the meetings on March 5 and 7 that she had been told that she would revert back to the clasp operator's rate if she did not accept the foreperson's position that had been offered to her. According to Dudik, it did not

[25] Whittaker testified that the paramedics told her that she had hyperventilated.

appear that Whittaker ''heard us'' and that she seemed more upset as the meeting went on. As it did not appear that Whittaker was in any condition to work, Dudik said that he thought it in the best interest of everyone that she take the rest of the day off. Dudik gave no indication during his testimony that Whittaker was ever informed that the Company would reconsider the action taken in connection with her pay.

Barrena drove Whittaker home on March 21. Whittaker testified that she spent the night without sleep. That evening, she said, one of the clasp department employees paid a visit to her home. According to Whittaker, the employee reported that Logan had assured the clasp department employees that Whittaker would be okay and that the Company would ''give [her] back what they had taken away from [her].'' With this hope, Whittaker reported for work the following morning and was told to report to an office where Barrena, Dudik, and Martinez had gathered to speak with her. At that time, Dudik spoke with her. Her account of what occurred at this time is as follows:

> Q. And what did he say to you?
>
> A. That my options were to go out on that floor for $5.25 an hour or to quit.
>
> Q. What did you do?
>
> A. I started to shake real bad again. My whole body was shaking, I told them—and it was the truth—I couldn't have worked for anybody that day if they told me they'd pay me $100 an hour. I needed a doctor.
>
> Q. Is that what you told them?
>
> A. Yes.

On direct examination, Dudik denied that he ever told Whittaker that her options were to work for $5.25 or quit. Subsequently, during cross-examination, Dudik testified that he had not made such a statement ''in those words.'' When asked if he had stated that in substance, Dudik responded: ''No. She had actually more options than that.'' Dudik never explained what other options were available to Whittaker on March 22. Barrena testified that this exchange was a ''rehashing of what had happened [the day] before and her pay and that we couldn't reduce her pay, and that she was all upset and that she was going to a doctor.'' Martinez did not testify about this meeting. Whittaker described the conclusion of the meeting and the events that later transpired as follows:

> Q. So what happened? Did anyone say anything?
>
> A. They said, ''Well, we'll give you a leave of absence, but we need a doctor's excuse.'' And I told them they'd get one. They said, ''We'll need one today.'' I said, ''You'll have it.'' And Frank walked me outside.
>
> Q. And what did you do then?
>
> A. I had to pull off the road two or three times before I got home. I was crying so much and I was shaking so much, and I couldn't believe they were really doing this to me. I couldn't believe that all this had really happened. But I did finally get home, and my husband was still there, and I was just crying and screaming, and he picked me up, and carried me to the doctor where I was given a sedative. . . . [H]e just took one look [at] me and said and wrote me up for 30 days' leave of absence.
>
> Q. Mmm—hmm. [Affirmative response.]
>
> A. For rest.
>
> Q. And so what happened then? Did you go home after that?
>
> A. Yes, I went home.
>
> Q. Did he give you medications?
>
> A. Yes, he did.
>
> Q. Do you know what the medication was?
>
> A. The first medication I was on was valiums.
>
> [Q.] Uh-huh. [Affirmative response.] And so you went home, and did you have any further communication with the Company that day?
>
> A. No.
>
> Q. Or that week?
>
> A. No. My husband went and brought me from the doctor. No. No, I never had any further.
>
> Q. Now after that, what happened to you?
>
> A. I never got better. I continued to get worse. I continued to just shake and cry, and my husband couldn't get me to do anything. I continued to—to not sleep. I continued to lose weight. I continued—I was down to 84, I think, at the time.
>
> Q. Eighty-four pounds?
>
> A. Yes.
>
> Q. And how much had you weighed a few—before the Union campaign started?
>
> A. I weighed approximately 100.
>
> Q. So you continued to lose weight and what else?
>
> A. I attempted to take my life a couple of times. My husband was worried that I was going to succeed in killing myself. I planned it out, and he caught me. And he was getting concerned, and he took me back to the doctor and told her that I wasn't getting any better. The doctor then told him that she was going to call the psychiatrist, that I needed—I needed psychiatric treatment. The doctor arranged to make an appointment with the psychiatrist, but I think it was two days before that appointment that I had my complete breakdown and was rushed to the hospital.
>
> Q. And you were rushed to the hospital—what hospital?
>
> A. The Rosemead, Alhambra—Alhambra Rosemead Mental Hospital.

According to Dudik, Whittaker did visit the plant briefly in the week following the March 22 meeting in connection with a medical leave of absence that she was granted. Following her initial hospitalization, Whittaker underwent months of psychiatric care and therapy. Throughout this period, Whittaker's medical leave was extended from time to time in accord with its policy of granting up to 6 months of medical leave. On September 7 Dudik notified Whittaker that her leave would expire on September 22. As Whittaker was still unable to work, Barrena notified Whittaker by a letter of October 2 that her employment was terminated. Whittaker was awarded a social security disability pension about a month before this hearing. She testified that she is still unable to work.

Steve Sisneros testified that he met with Company Vice President Norton about a month or a month and a half following the February election. The principal purpose of the meeting, Sisneros said, was to complain about the conduct of Martinez and Foreman Nieto. During their extended ex-

change, Sisneros also claims that he told Norton that the employees' opinion of Dudik had changed after Whittaker's pay was cut. According to Sisneros, Norton stated that ''Ethel should have realized that her pay was going to be cut because she was changing positions in the Company.''

3. Erwin Afre

a. *Afre's employment background and union activity*

Afre was hired by Respondent in April 1980. For his first few months he worked as a helper on the sheeter operation in the cutting department and then he became a sheeter operator. After about 10 months Afre was transferred to the production office where he worked for approximately 11 months. At his request, Afre was transferred back to the sheeter operation where he worked as an operator until he was terminated on October 22, 1990. In his final months of employment, Afre's hourly pay rate was $10.08. His immediate supervisor was Frank Nieto, the cutting department foreman on the first shift.

Afre first learned of the union organizing campaign in late October or early November 1989. Thereafter, Afre attended the union meetings, passed out union pamphlets, and solicited employees to sign union authorization cards. He was pictured along with Garcia and Whittaker in a January 1990 organizing newsletter that Dudik alluded to in one of his meetings with employees about the Union.

The Union subpoenaed Afre to appear and testify at the representation case hearing. He showed the subpoena to Martinez when he sought permission to be absent from work for that reason.[26] Although Afre attended the hearing on both dates, he was not called as a witness. As noted above, Afre tape recorded one of the employee meetings conducted by Dudik concerning the Union and provided that tape recording to the Union. At the NLRB election in February, Afre was designated by the Union as one of its employee observers and he served in that capacity along with Whittaker. The morning following the election, Afre claims that large signs in Nieto's handwriting were posted on and around Afre's machine displaying the election tally and the words ''You lost.''[27]

b. *Afre's disciplinary warnings and termination*

It is undisputed that between December 11, 1989, and October 22, 1990, Afre received four disciplinary notices for violations of the Company's work rules. Consistent with its policy, the Company discharged Afre when he was issued the fourth notice on October 22. The General Counsel's complaint alleges, however, that the December 11, 1989 warning was unlawfully motivated. If so, Afre's October 22 discharge is arguably unlawful. See, e.g., the analysis pertaining to Judy Curtis in *Bakersfield Memorial Hospital*, 305 NLRB 741 (1991).

Afre drove his wife's automobile to work on Monday, December 11, 1989, because she needed the family van that he normally drives. By the time he arrived at work, he had discovered that the family's desk-style checkbook was in the automobile. Afre telephoned his wife after arriving at work to report that fact and arranged for her come to the plant for the checkbook at lunchtime. For convenience sake, Afre took the checkbook into the plant and placed it on the shelf of his work cabinet along with his lunch pail.

Afre claims that sometime between 7:30 and 8 a.m., Nieto stopped at his machine and, after they exchanged greetings, the two men briefly discussed a problem with the machine. About 1 p.m., Afre said that Nieto came to his machine and requested that Afre accompany him to Martinez' office.

At the office, Martinez handed Afre a disciplinary notice and told him to sign it. The disciplinary notice states that Afre was ''not paying attention to the sheeting [operation].'' It further states that Afre was ''writing out a check in his checkbook'' and that there was ''mail on top of [his] table.'' After Afre read the notice he refused to sign it claiming that he had not written a check during his worktime as asserted in the notice. Afre then asked, in effect, why Nieto had not spoken to him about the matter before. Although Afre's account reflects that Nieto apparently argued that Afre was guilty of writing in his checkbook when he should have been working, his testimony does not reflect that Nieto ever responded to Afre's inquiry about the lack of any prior confrontation. Later, after Nieto left the office, Afre claims that he again told Martinez that he had not been writing a check. At the hearing, Afre emphatically denied that he had written a check that morning; he explained that his wife writes almost all the checks in their family and that he very rarely writes a check.

Nieto disputes Afre's account of what occurred in the plant that morning. He testified that Afre was standing at his tool cabinet near the sheeting machine at about 10:15 ''writing the check or writing out on the checkbook.'' After observing Afre, Nieto asked what he was doing and Afre responded, ''Nothing.'' By this time, Nieto claims, Afre was in the process of putting the checkbook beneath some newspapers on the cabinet. Nieto said that he told Afre: ''You shouldn't be doing this. I know what you're doing.''

Nieto said that he did not have authority to issue a warning but that he recommended to Martinez that a warning be given. Nieto explained that Martinez' other responsibilities around the plant delayed the actual issuance of the disciplinary notice until after lunch. Nieto also claimed that he was unaware that Afre supported the Union at this time and denied that the warning was issued because Afre was subpoenaed to testify at the representation case hearing on the previous Friday.

Martinez testified that the warning was issued within 10 or 15 minutes after the incident occurred. At the outset of the disciplinary meeting, Martinez claims that he asked Afre if ''he had in fact did what Frank [Nieto] claimed'' and that Afre did not deny it. Martinez said that he intended the warning to be a written warning—the second step in Respondent's progressive disciplinary process—because there

[26] Afre claims that he gave the subpoena to Martinez when he asked to be absent and that Martinez asked if he was going to talk against the Company.

[27] Juan Montiel, a bailer at the Company who typically reports for work between 5 and 6 a.m., testified that he observed Nieto posting the election result signs on the sheeter machine where Afre worked prior to the start of the day shift on the morning after the NLRB election. Nieto acknowledged that he observed the signs around Afre's machine and at other locations throughout the plant that day but he denied that he posted the signs. According to Nieto, the signs were removed and replaced throughout the day but he never observed who posted the signs.

had been another similar incident prior to this that had resulted in an oral warning.[28]

Respondent subpoenaed and was provided with the Afres' checks and check stubs for the period from October 29, 1989, through March 6, 1990, which bear the preprinted numbers 3001 through 3096. These documents and certain other documents from Afre's personnel file were subsequently analyzed at Respondent's request by John J. Harris, an expert examiner of questioned documents. Harris said that he was requested to compare samples of Afre's writing with the writing on check stub 3029 for a check that was dated December 10, 1989.

Based on his analysis, Harris concluded that Afre wrote the words ''Lucky Foods'' that appears in the margin of that stub under the numerals ''12–7.'' Harris said that he was unable to determine whether Afre wrote the numerals ''107'' that appear to the right of the ''Lucky Foods'' notation. Harris also testified that this entry would have taken only seconds to write if Afre was not doing anything else or looking around, and that he could not determine when the entry was made. Nonetheless, Afre denied that he made the ''Lucky Foods'' entry.

Subsequently, Afre was given another disciplinary notice on April 2 for sheeting an order short, i.e., at dimensions shorter than called for in the production ticket for the job, on March 9. This disciplinary notice refers to the December 1989 warning as a verbal warning and notes that the next disciplinary measure will result in a 3-day suspension.

On June 11 Afre was given a third disciplinary notice for sheeting an order short again. On this occasion, Afre was suspended from June 12 through 14 consistent with the Company's policy. In addition to the foregoing work rule warnings, Afre was also issued a disciplinary warnings on April 17 and August 20 for violating the Company's excessive absences and tardiness policy, respectively. The August 20 warning was issued after Afre injured his hand that morning.

From August 20 until October 22, Afre was on a medical leave of absence due to the injury to his hand. When he returned on the morning of October 22, he was summoned to Barrena's office where he was given another disciplinary notice for sheeting different shades of brown craft paper together on August 1. This error was discovered, according to Respondent's witnesses, when the stock was later pulled for use in making envelopes. Because this was the fourth disciplinary notice within a year's period of time, Afre was discharged.

Afre's final disciplinary notice and a record prepared by Barrena at the time both reflect his prior disciplinary notices of December 11, 1989, April 2 and June 11, 1990. Barrena's record then states: ''Final disciplinary action to be taken, after aforementioned progressive discipline, is termination of employment as the result of the 08/01/90 incident.''

[28] Martinez' reference to another prior warning is unclear. Respondent introduced a June 13, 1988 written warning for reading literature at his machine and a December 10, 1987 verbal warning for failing to start work on time because he was talking to another nearby employee. Both of these warnings, however, were stale under Respondent's progressive disciplinary system by the time the December 1989 warning issued.

c. *The entries into Afre's tool cabinet*

As Afre was leaving the plant on the morning of October 22, Plant Superintendent Ravenscroft asked Afre what he planned to do with his tool cabinet. Afre told Ravenscroft that he would need a pickup to transport the cabinet so he would return for it later.

It is undisputed that Afre's locked cabinet was opened twice by company supervisors in the period before Afre finally transported the cabinet home on November 7. On October 22, Maintenance Supervisor Mark Genera opened the lower part of the cabinet purportedly because Cutting Department Supervisor Nieto needed some of the Company's tools that Afre stored in the cabinet. Nieto testified that he needed an adjustable wrench that is used on the sheeter machine. Barrena authorized Genera to open the cabinet. According to Genera, a log of the items removed from the cabinet was prepared at that time.

When Afre returned for the cabinet on November 7, Genera asked Afre to open the top part of the cabinet to check for company equipment. Afre claims that he told Genera that the keys were at his home and that he returned home to retrieve the keys. Genera claims that Afre informed him that he had lost the keys and left the plant. After Afre left, Genera again obtained permission from Barrena to open the cabinet. At this time, Genera opened the top part of the cabinet in the presence of Ravenscroft. Again, a log of the items removed from the cabinet was prepared.

A few hours later that day Afre returned to the plant for the cabinet. According to Afre, Genera told him at this time that the key was no longer necessary and loaded the cabinet on to the vehicle for Afre. When Afre arrived home and inspected the cabinet, he says that he discovered certain personal items had been removed from the cabinet including a set of Allen wrenches, a can of lubricating spray, some knives, a calendar containing Afre's personal notes, and some union materials. The logs prepared when the cabinet was opened by Genera contain no reference to any of these items nor to the adjustable wrench referred to by Nieto.

After discovering items were missing from the cabinet, Afre claims that he called Genera and asked why the materials had been removed from the cabinet. He claims that Genera hung up without responding. Genera claims that Afre called to asked if he had opened the cabinet. Genera told Afre that he had opened the cabinet, and that Afre said that he would get him and then hung up.

D. *Further Findings and Conclusions*

1. The 8(a)(1) allegations

Employer interference, restraint, or coercion of employees who exercise their statutory right, form, join, or assist labor organizations is unlawful under Section 8(a)(1) of the Act. Many cases that arise under Section 8(a)(1) involve verbal exchanges between employees and management officials and, consequently, give rise to questions of ''free speech'' codified in Section 8(c) of the Act. That latter section provides that the expression of ''any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.''

The test under Section 8(a)(1) does not ''turn on the employer's motive or whether the coercion succeeded or failed [but instead on] whether the employer engaged in conduct which, it may reasonably be said, *tends to interfere with* the free exercise of employee rights under the Act.''[29] (Emphasis added.) In addition to the variety of direct threats and promises of benefit excluded as protected speech under Section 8(c), less explicit forms of interference are also prohibited by Section 8(a)(1).[30]

The General Counsel argues that the exchanges between Martinez and Whittaker that commenced in mid-October 1989 included unlawful interrogation, and statements that explicitly threatened plant closure and discharge, implicitly created the impression that employee union activity was under surveillance by management and conveyed the futility of union representation.

Respondent, relying on Martinez' testimony, argues that the unlawful statements attributed to him never occurred and asserts that, in light of the rationale in the *Rossmore*[31] line of cases and Whittaker's well-known leading role in the organizing campaign, any questions Martinez may have asked concerning her union sentiments were not coercive.

Both sides argued at length concerning the credibility of the two principal witnesses who testified about these allegations. On the one hand, the fact that Martinez was terminated by Respondent prior to his testimony tends to support his credibility. Obviously, if this case involved solely a swearing match between Whittaker and Martinez related to these exchanges, that fact would weigh heavily in his favor.

Martinez' testimony, however, on other matters of significance is at odds with credible accounts by numerous witnesses for both sides. Thus, his assertions that Whittaker was not a qualified folding machine operator and had never worked as a relief operator, a point central to Whittaker's discrimination case, are contrary to testimony by former employee Dalrymple and former Plant Manager Thomas. In addition, Plant Manager Barrena eventually conceded that she was the most qualified of all those who applied in connection with the March 6 postings and Whittaker's employment application reflects considerable folding machine experience. His testimony that Afre never denied writing in his checkbook at the December 11, 1989 disciplinary conference is at odds with Foreman Nieto's testimony. Moreover, Sisneros, still an employee of Respondent at the time of the hearing, testified with considerable conviction about another instance of interrogation by Martinez similar in character to the nature of the conduct Whittaker attributes to Martinez in the early days of the union organizing campaign. Sisneros' credibility on this point is substantially enhanced by the fact that he forthrightly confronted the plant's highest officials concerning Martinez' conduct, a highly improbable step if his claims were fabrications. Martinez' bare claim that he had never observed Dalrymple openly selling candy and raffle tickets at her machine is unbelievable. His effort to exaggerate Garcia's conduct in connection with the Guzman matter does not square with the account given by Guzman when she was called as a witness for Respondent. In view of the foregoing, I have concluded that to the extent that Martinez' testimony conflicts with that of other witnesses, his accounts are not reliable. Accordingly, I find that Martinez' fundamental claim that he initiated no conversations with Whittaker concerning employee union activity is not credible and that Whittaker's account of their exchanges early in the organizing campaign is reasonably reliable.

Respondent's further claim that Martinez' conversations with Whittaker were lawful based on the *Rossmore* rationale also lacks merit. Even assuming that Whittaker was acting openly in her early efforts on behalf of the Union, Martinez' remarks crossed the line of inquiry permitted even in that case. Martinez' unsupported suggestion that the plant might close as a result of the employee union activity alone distinguishes his inquiries from those addressed in *Rossmore*. There the Board explicitly dealt with forms of inquiry made to open and active union supporters ''in the absence of threats or promises.'' That plainly is not the situation here.

In agreement with the General Counsel I find, based on the credited testimony of Sisneros and Whittaker detailed in section B, subsection 1, above, that Martinez unlawfully interrogated those two employees concerning their union activity. Rather than probing merely the sentiments of those two employees, Martinez' inquiries related to the logistical details of employee activity, including the identity of other employees involved as well as the scheduling of, and attendance at, union meetings. The overall character of these inquiries implies that management in general and Martinez in particular was engaged in carefully monitoring legitimate, protected employee activity. No circumstances suggest any lawful purpose existed for conduct of this nature. Accordingly, I find that Martinez' interrogation of Sisneros and Whittaker, and the implication of surveillance flowing therefrom, would have a tendency to inhibit the free exercise of rights guaranteed under the Act and thereby unlawfully interfered with their protected activities in violation of Section 8(a)(1) of the Act.

In addition, the General Counsel's allegations that Martinez' statements sought to impress on Whittaker the futility of organizing a union is also supported by the credited evidence. Standing alone, Martinez' repeated remarks that the plant would never ''go union'' are ambiguous. Thus, this statement could be interpreted either as a prediction that the employees would reject unionization or as his statement that management would intervene to frustrate the organizational activity. Martinez' added, unsubstantiated forecast, however, during one of his exchanges with Whittaker that ''they'll shut the doors'' before going union removes the ambiguity by identifying management as the source of interference. His later statement to Whittaker to the effect that the Company might not negotiate with the Union even if the employees chose to be represented reinforces this conclusion. Independent of his repeated assertions that the plant would never go union, these latter remarks have a strong tendency to interfere with protected employee activity and have a coercive effect on employees engaged in such activities. Accordingly, I find that Respondent violated Section 8(a)(1) as alleged by threatening Whittaker that the plant could potentially close as

[29] *American Freightways Co*., 124 NLRB 146, 147 (1959).

[30] *Great Dane Trailers*, 293 NLRB 384 (1989), interrogating employees about their union activities and the activities of other employees; *Orval Kent Food*, 278 NLRB 402 (1986), verbally promulgating discriminatory no-talking rules; *Dillingham Marine*, 239 NLRB 904 (1978), words creating the impression that union activities are under surveillance.

[31] *Rossmore House*, 269 NLRB 1176 (1984).

a result of the cause she was championing and by stressing the futility of her union organizational activities.

Based on Whittaker's credited testimony, I further find Martinez violated Section 8(a)(1) of the Act by telling her that he would fire employees for talking about the Union on worktime but would not discipline employee's who discussed baseball at similar times. I find it unnecessary to decide whether this exchange amounted to a formal promulgation of a plant rule, later maintained and enforced, as alleged by the General Counsel. Standing alone, Martinez' statement to Whittaker reflects an intention to unevenly discipline employees engaged in similar nonwork activities during working time and would have a strong tendency to restrain the free exercise of Section 7 rights.[32]

The General Counsel's claim that Respondent broke into Afre's tool cabinet without authorization, examined his personal materials, and removed certain items is not, in my judgment, supported by a preponderance of the evidence. Although it is undisputed that Respondent's agents opened the cabinet on October 22 and again on November 7, Respondent claims, in effect, that it had a right to do so in order to remove its property from the cabinet and denies that it removed Afre's personal materials including Afre's calendar, notebook, and union materials.

I agree that Respondent had a right to enter Afre's tool cabinet to remove company equipment but it did not have a right to confiscate his personal materials after he notified Ravenscroft that he would return later for the cabinet with a vehicle more convenient for its removal. No claim is made that the itemized materials removed from the cabinet did not belong to the Company. Likewise, no claim is made that these materials were not regularly used in the operation of the sheeter machine.

Although the evidence shows generally that Afre usually secured his tool cabinet when he left the plant, his departure from the plant on August 20 with a severe hand injury was under less than normal circumstances. No evidence establishes specifically that Afre secured the cabinet at this time from general access. Indeed, the fact that the Company took no unusual steps to gain entry to the cabinet containing materials regularly used in the sheeter machine operation during Afre's 2-month absence after August 20 potentially gives rise to an inference that the cabinet was open during that period.

Because of his injury Afre did not return to the plant until October 22. At that time he was promptly discharged. No evidence establishes that Afre inspected the cabinet in the short period he was at the plant on October 22 in a manner that would permit him to vouch for its contents. Absent evidence that Afre secured the cabinet on August 20 or that he carefully inspected the cabinet while at the plant on October 22 and noted the presence of the materials he later found missing, it is impossible to infer on this record that the only persons who had access to the missing materials were the supervisors who opened the cabinet on October 22 and November 7.

The cases cited by the General Counsel in support of this allegation, *Clark Equipment Co*., 278 NLRB 498 (1986), and *Intermedics, Inc*., 262 NLRB 1407 (1982), are factually inapposite. In *Clark*, a supervisor rifled through an employee's toolbox that contained union literature; in *Intermedics*, a supervisor directed an employee to remove a union sticker from the exterior of his toolbox. Neither case involved entry into a storage container where both personal and company property were commingled as is the case here and, consequently, the inference that the only purpose for entry was to inspect the employee's union materials—which the Board drew in the *Clark* case—would not be reasonable. Furthermore, the relevant events in both of those cases occurred during ongoing organizing campaigns. Here, the entry was made almost 9 months after the NLRB election. Accordingly, as I have concluded that the General Counsel has failed to prove the allegations concerning an unlawful entry and removal of personal items from Afre's tool cabinet, I recommend dismissal of those allegations.

Regarding the allegations that Dudik violated Section 8(a)(1) of the Act by telling employees that they would lose benefits and start ''back at ground zero'' if the Union won the election, the General Counsel argues that this conduct is governed by the Board's recent decision in *Lear Siegler*, 306 NLRB 393 (1992). There, the Board alluded to the following summarization from its decision in the *Taylor Dunn*, 252 NLRB 799 (1980), enfd. 810 F.2d 638 (9th Cir. 1982), as the standard for determining whether statements of this character violate Section 8(a)(1):

> It is well established that ''bargaining from ground zero'' or ''bargaining from scratch'' statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations. [Emphasis added, fns. omitted.]

Assessment of the legality of such statements is made from the totality of the circumstances surrounding such statements. *Tufts Bros*., 235 NLRB 808 (1978).

Dudik's remarks to employees, as heard on the copy of Afre's recording, that wages and benefits would change ''the day they come in'' and ''as of that day,'' are misleading with respect to an employer's legal bargaining obligation that arises on the selection of an exclusive representative under this Act. As a general rule, that obligation requires an employer to maintain existing wages, hours, and other terms and conditions of employment in effect until changes in those employment terms are negotiated with the employees' representative. *NLRB v. Katz*, 369 U.S. 736 (1961). I find that the import of his remarks that changes that would occur immediately on the mere selection of the Union, even when considered together with his subsequent explanation that

[32] The General Counsel alleges that this threat by Martinez also violated Sec. 8(a)(3) of the Act. Both cases cited by the General Counsel, however, *K & M Electronics*, 283 NLRB 279 (1987), and *Orval Kent Food Co*., supra at fn. 31, find similar statements violate Sec. 8(a)(1) of the Act. As there is no evidence here that Martinez actually took disciplinary action against any employee for discussing the Union during worktime, I will recommend dismissal of the 8(a)(3) allegation.

wages and benefits would be ''based on what the new agreement is between the Company and the Union,'' is that employees would be placed in a position of bargaining for the restoration of the existing wage and benefit levels. Accordingly, I conclude that Dudik's statements to employees about potential changes in wages and benefits violated Section 8(a)(1) as alleged.

2. The 8(a)(3) and (4) allegations

Section 8(a)(3) prohibits employer ''discrimination [against employees] in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization.'' Section 8(a)(4) prohibits an employer from ''discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under [the] Act.''

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board adopted a causation test for cases alleging violations of the Act that turn on employer motivation. Later, in the *Hunter Douglas, Inc.*, case, 277 NLRB 1179 (1985), the Board summarized the salient aspects of its *Wright Line* causation test as follows:

> The Board held in *Wright Line* . . . that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must ''persuade'' that the action would have taken place absent the protected conduct ''by a preponderance of the evidence.'' *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Bronco Wine Co*., 256 NLRB 53 (1981).

The Board utilizes its *Wright Line* causation test in the analysis of 8(a)(4) cases. See, e.g., *Gary Enterprises*, 300 NLRB 1111 (1990); *Taylor & Gaskin, Inc*., 277 NLRB 563 (1985). Although the language of Section 8(a)(4) states that the proscription applies to employees who have filed charges or given testimony under the Act, the Supreme Court has construed this language broadly in order to protect employee access to the Board. *NLRB v. Scrivener*, 405 U.S. 117 (1972). Consequently, the Board has held that Section 8(a)(4) applies even when an employee appears at an NLRB hearing pursuant to an subpoena but is not actually called to testify. See *Quality Millwork*, 276 NLRB 591 (1985).

A constructive discharge occurs when an employer purposefully creates working conditions so intolerable that the employee has no option but to resign. *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984). In applying this standard, the General Counsel has the burden of proving that: (1) the employer imposed difficult or unpleasant conditions in order to force the employee to resign; and (2) the employer imposed the difficult or unpleasant conditions because of the employee's protected activities. See *Adscon, Inc*., 290 NLRB 501 (1988), and the cases cited therein. Pay reductions are a common form of achieving such a result. See, e.g., *La Favorita*, 306 NLRB 203 (1992)—employee's hours reduced resulting in reduced pay; *Norris Concrete Materials*, 282 NLRB 289 (1986)—employee's hours reduced to 25 or 30 per week in order to starve him out.

a. *The warnings, Afre's discharge and Garcia's permanent layoff*

I am satisfied that the General Counsel has established a prime facie case that the December 1989 warnings issued to Afre and Garcia were discriminatory. The essential elements of activity, knowledge, union animus, and timing are plainly present. Martinez issued both warnings. The findings above establish unmistakable union animus on his part predating the two warnings at issue. Knowledge of the employee protected activity is not disputed; both employees sought permission to appear at the representation case hearing the prior week, both admittedly attended the hearing in compliance with the Union's subpoenas, and Garcia actually testified. Additionally, in the days immediately prior to receiving his warning, Garcia became open and vocal in support of the Union at the plant by displaying union materials in his toolbox and engaging in a form of subdued heckling of statements made by Dudik at an employee meeting about the Union on December 12. Indeed, the very activity for which Garcia received a disciplinary notice was concerted in character and, thus, potentially protected by the Act. Both warnings were issued within a week of their appearance at the hearing; Afre's warning, in particular, issued on his first workday following his appearance at the hearing.

Respondent contends that both warnings were legitimately issued for infractions of plant rules. Both employees, Respondent argues, would have received the warnings even absent their protected activities. Garcia was admittedly speaking to Guzman while she was engaged in a work activity. And assuming without deciding that Afre was making the Lucky Foods entry in his checkbook consistent with the charge by Nieto that he was writing in his checkbook, I am not satisfied that Respondent has carried the burden of persuasion in either case.

The preponderance of the evidence in this case fails to show the existence of a plant culture so rigid as to conclude that the even small infractions of the rules are routinely dealt with under Respondent's formal disciplinary system. On the contrary, Thomas' reminder concerning important plant rules alludes to disciplinary action if employees are chronic violators. Other indicia such as the existence of a coffee pot in the high speed department, which was utilized by employees from other departments, the open sale of raffle tickets and candy, and food being consumed on the plant floor all strongly suggest that brief, momentary distractions from work activity occurred and were tolerated in the atmosphere of this plant. Even Martinez' own testimony that he informally admonished Whittaker several times about leaving her department to talk with other employees concerning the Union is consistent with this conclusion.

Both warnings here involved incidents that were extremely brief. Although Afre had received a prior warning well over a year before the December 11 warning for keeping newspapers on his tool cabinet, no evidence shows that he has since been chronically distracted by personal affairs while

engaged in work activity at or around the time this warning was issued. Indeed, if, as claimed by Nieto, Afre attempted to hide the checkbook under some newspapers after Nieto observed him, that fact was entirely overlooked in the warning itself even though the presence of newspapers on his tool cabinet was extensively noted in his June 1988 warning.

Garcia's warning involves other unexplained elements. Obviously, both Garcia and Guzman were involved in this exchange but only Garcia, who was on break, received a disciplinary notice. Martinez' attempt to explain this obvious disparate treatment by claiming that Garcia was going around asking several employees about their rates of pay is not corroborated by any other source. On the contrary, both Guzman, a witness called by Respondent, and Garcia agree about the purpose of their short visit. Their testimony shows that Garcia was focused solely on Guzman's pay matter. Equally unanswered in Garcia's case is why company officials deemed it necessary to issue a formal disciplinary notice to Garcia on the very eve of his permanent layoff.

In sum, I find that the warnings to Afre and Garcia at issue here represent a marked departure from the Company's usual policies and practices. In view of the evidence establishing that both employees were prominent union activists who appeared only days before at the representation hearing at the behest of the Union and Respondent's union animus, I find it reasonable to infer that Respondent's motive was to punish Afre and Garcia for their union activity, including their attendance at the representation hearing. Accordingly, I conclude that Respondent violated Section 8(a)(1), (3), and (4) of the Act by the warning notice given to Afre on December 11 and the warning notice given to Garcia on December 14.

In view of the foregoing conclusion that Afre's December 11 warning was unlawfully motivated, I further conclude that his October 22, 1990 termination, based on Respondent's progressive disciplinary system and utilizing the December 11 warning to satisfy the requirements for discharge under that system, would not have occurred in the absence of the December 11 warning. *Bakersfield Memorial Hospital*, 305 NLRB 741. Accordingly, I conclude that Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging Afre.

As Garcia was permanently laid off only the day after receiving the December 14 warning, the same elements of activity, knowledge, animus, and timing noted above underlie the General Counsel's prime facie case. This prime facie case is further enhanced by the showing that only Garcia was affected by the purported loss of business in the open-end department. In addition, Garcia impressed me by his deportment on the witness stand as an articulate extrovert, characteristics consistent with his claims about challenging Dudik's assertions in the employee meeting, and his willingness to go to bat for other employees as he planned to do for Guzman. In my judgment, Garcia clearly would have emerged as the principal employee leader in the organizing campaign had he not been laid off so early.

Respondent argues nonetheless that Garcia's layoff resulted from a downturn in business in the open-end department that resulted when one of its customers acquired its own equipment. In light of this development, Respondent contends that Dudik commenced an evaluation of the staffing in the open-end department shortly after he became the general manager in October 1989 and ultimately concluded that the department was overstaffed. As Garcia was the least senior adjuster in the department, he was selected for layoff. This decision, Respondent asserts, was affected, in part, by Pena's decision to delay his retirement. The decision to make Garcia's layoff permanent, according to Respondent, resulted from Dudik's conclusion that business would not increase in the foreseeable future. And, Respondent explains, it did not consider returning Garcia to a machine operator's position because its personnel policies do not provide for bumping and it did not recall Garcia when new machine operators were hired because its policies only provide for recalling employees to the same department from which they were laid off. Finally, Respondent contends that the other open end adjusters it hired in 1990 were more qualified than Garcia.

For the following reasons, I find Respondent's explanation for Garcia's layoff unpersuasive. First, apart from Dudik's bare assertion about a decline in its open end business, no evidence was proffered to support this economic claim. The fact that the asserted decline in business resulted in no other layoffs in that department together with Pena's testimony that a decline in business was not apparent to him makes this basic premise suspect.

Second, the assertion that Pena's postponed retirement was a consideration is clearly an afterthought. Pena's testimony makes clear that his change of heart about retiring involved a decision *to work for another year*. This testimony implies that the Company likely knew of Pena's altered retirement plan well before Garcia was even promoted to the open-end adjuster's position.

Third, Dudik's explanation that Respondent's recall policy does not provide for recalling employees to different departments essentially begs the question. By Martinez' emphasis that Garcia was *permanently* laid off, Respondent effectively discharged Garcia or, at the very least, exhibited an intent to preclude Garcia from recall to any position.

Fourth, even assuming that Garcia was given a modicum of consideration for recall as Barrena's testimony implies, Dudik's assertion that Respondent's recall policy does not provide for recalling employees to other departments is, in my judgment, spurious. Although it is true that the language of the policy does not so provide, the language of Respondent's recall policy is so broad as to compel the conclusion that a laid-off employee is eligible, under the policy, for recall to any needed position if management judges the employee at all qualified. Indeed, Garcia's uncontradicted testimony that one envelope machine operator was recalled to a clasp machine operator's job during his limited term at the Company is consistent with that conclusion. Furthermore, the fact that the Company even hired a job applicant for a position other than that applied for, as it did in Garcia's case, strongly suggests that Dudik's narrow interpretation of the recall policy was for reasons other than a legitimate business purpose.

Fifth, the claim that Ortiz—hired as an adjuster in early March and the first open-end adjuster hired after Garcia's departure—was more qualified than Garcia is not convincing. To support this claim, Respondent points to Ortiz' experience on the 249 machine that went into operation at Respondent's plant in late February. The actual amount of experience Ortiz acquired as a 249 adjuster with his prior employer is unclear, however, as at least part of his total experience with the 249

machine was merely as an operator. Assuming that Ortiz had some minimal experience as a 249 adjuster, even that experience was minimized by Barrena's explanation that every 249 machine is different. Additionally, to the extent that pay could be considered as an objective criteria, Ortiz' starting hourly rate was 33 cents below Garcia's adjuster's rate. By contrast, the three subsequent adjusters hired by Respondent, whose experience on paper clearly exceeded Garcia's, started at rates ranging from about $1.70 to $2.70 per hour more than Garcia's hourly rate.

And sixth, the disciplinary warning issued the day before Garcia's termination strongly suggests that his layoff was a precipitous act rather than the product of a careful study over a period of time concerning the staffing needs of the open-end department. The fact that Respondent posted an opening for a high speed adjuster trainee position during the week preceding Garcia's layoff without providing him any notice that his position was in jeopardy and an opportunity to apply for the high speed adjuster's position reinforces this conclusion.[33]

In sum, I conclude that a preponderance of the evidence supports the conclusion that Garcia was permanently laid off or discharged because of his activities on behalf of the Union, including his appearance and testimony in support of the Union's position at the representation case hearing. Accordingly, I find Respondent, by such conduct, violated Section 8(a)(1), (3), and (4) of the Act, as alleged.

b. *The Whittaker allegations*

Whittaker was perceived by Respondent as the leading union advocate, especially after Garcia's departure. The findings made in connection with the 8(a)(1) allegations, the warnings issued to Afre and Garcia, and Garcia's layoff all establish that Respondent harbored a strong union animus during the period when General Counsel alleges discriminatory action was taken against Whittaker.

Nevertheless, I am satisfied that the General Counsel has failed to prove a prime facie case showing that Whittaker was discriminatorily denied weekend overtime work or inventory week work after she became involved in the union organizing campaign. As described in section C, subsection 2c, above, most of Whittaker's weekend 1989 overtime work occurred after the Company knew of her union activity. Although it is true that Whittaker's scheduled overtime was countermanded for Saturday, December 2, 1989, that situation involved an arrangement made with the supervisor of another department. No evidence shows that this particular supervisor had routinely scheduled Whittaker for weekend overtime work in the past. Likewise, no direct evidence shows a causal connection between the cancellation of the overtime on this occasion and Whittaker's union activity and circumstantial evidence linking this incident with Whittaker's union activity is greatly minimized by the showing that she worked numerous Saturdays after her activity became well known, including Saturdays following December 2. For these reasons, I find that the General Counsel's evidence is insufficient to establish a prime facie case on this allegation.

Even assuming that a prime facie case exists on the weekend overtime issue, Respondent defends on the ground that the supervisor failed to first solicit lower paid department employees in accord with company policy and, after doing so, obtained enough department volunteers to cover the overtime. As General Counsel made no attempt to rebut this evidence, I would find that Respondent has carried its burden of persuasion on this issue. Accordingly, I recommend dismissal of this allegation.

I reach the same result with respect to the claim that Whittaker was unlawfully denied inventory week work in December 1989. The General Counsel's claim here rests on Whittaker's bare claim that she was always given the opportunity to work the inventory week and that she did so except when she chose to go on vacation. As the documentary evidence shows that Whittaker did not work inventory weeks in December 1988 or June 1989, as well as the week in issue, and otherwise contains no certain explanation for not having done so on those particular prior occasions, I find that General Counsel has failed to establish any recent pattern that Whittaker was assigned to work during inventory week.

But again assuming that the General Counsel has established a prime facie case on this point, I find Respondent once more carried its burden of persuasion. Respondent's claim that the December 1989 inventory week was limited to inventory work and, consequently, required the services only of those employees most familiar with the finished goods on hand is not rebutted by any contrary evidence or otherwise inherently implausible. Accordingly, I recommend dismissal of this allegation.

With respect to Whittaker's March 1990 reduction in pay, the General Counsel argues that the reasons advanced by Respondent for this adverse action are pretextual. In effect, General Counsel claims that Whittaker, in the absence of her union activities and sympathies, would have been awarded one of the existing vacancies as a folding machine operator based on her qualifications.

Respondent argues that Whittaker's pay cut was justified and lawful. In support of its claim, Respondent asserts that Whittaker was plainly made aware that her pay would be reduced if she refused the auxiliary department supervisor's position when offered. In addition, Respondent claims that despite requests by Dudik and Barrena that she do so, Whittaker failed to bid on the existing folding machine operator vacancies.

Assuming arguendo that Whittaker was not told about the pay cut or that she would be required to sign the bid posting, Respondent argues that the promise by Barrena and Dudik to straighten the matter out after she learned of the pay cut on March 21 is evidence that, at most, Whittaker's pay cut resulted from a misunderstanding rather than an intentional effort to make her working conditions intolerable. Respondent argues, in effect, that Whittaker's testimony concerning Dudik's March 22 ultimatum to work at the lower wage or quit should not be credited when, as here, she had previously been given at least two options to avoid a pay cut, i.e., ac-

[33] Considerable testimony was adduced about the fact that adjuster skills on one type of machine such as an open-end machine are not entirely transferable to another type of machine such as a wide range machine and that added training is required when an employee makes such a transfer. The fact, however, that Garcia may not have had experience as a high speed adjuster appears of no moment for two reasons. First, the posting did not seek experienced adjusters and, second, Garcia had no open-end adjuster experience when he was promoted to that position in October. Instead, his prior adjuster experience was on the wide range machines.

cept the supervisor's job or sign the bid for a folding machine vacancy.

In my judgment, Whittaker's pay reduction is a classic clenched fist in the velvet glove case. The events that occurred between March 5 and 22 establish without a doubt that the only real choice provided to Whittaker was to accept the supervisor's position or quit. This offer to promote Whittaker is both benevolent and self-serving. By promoting Whittaker to a supervisory position for which she was otherwise admittedly the most qualified employee in its work force, Respondent assured itself that the leading union advocate in the recently concluded organizing campaign could not participate in future organizing activities. This tactic is not that uncommon nor necessarily unlawful. After Whittaker refused the position, however, Respondent's benevolence ended and the clenched fist was swung with full force.[34]

The explanations by Dudik and Barrena for failing or refusing to consider Whittaker for an existing folding machine operator vacancy are contradictory and unpersuasive. Both initially claimed that they were unaware of Whittaker's experience as a folding machine operator but Barrena finally conceded that Whittaker likely would have gotten the position if she had bid on it based on her qualifications. The professed ignorance of Whittaker's qualifications as a folding machine operator is further undercut by Whittaker's uncontradicted account of her exchange immediately after the March 7 meeting with Martinez in which he stated that he had been ordered to remove her as a relief operator. Assuming that is true, as I have, it is reasonable to infer that the order came from one of his superiors, namely, Dudik or Barrena.

Dudik's assertion that it would have been unfair to consider Whittaker for a folding machine operator vacancy because she failed to sign the posted bid form is an obvious pretext. This claim does not square at all with the testimony by Barrena and Martinez that employees are deemed to have bid for a posted position if they or their supervisor merely submit a written note expressing their interest in the posted position. The relevant bids in evidence even show that practice was followed in this particular case. In light of this evidence, any finding that Respondent maintained a rigid bidding system implied by Dudik's testimony is simply unwarranted and his explanation for failing to transfer Whittaker to a folding machine job, and thereby keep her existing pay rate, lacks logic and candor.

Concluding as I have that Barrena and Martinez more accurately described the workings of Respondent's bidding process, this record is simply void of any explanation for their failure to treat Whittaker as a bidder for a folding machine position. By the standard they describe, Whittaker's repeated verbal requests on March 5 and 7 as well as her written request contained in the letter she delivered to Dudik and Barrena on March 7 for a folding machine operator's position unquestionably qualifies. Accordingly, as I find that Whittaker made her interest in a folding machine position very well known, I conclude that she in fact timely bid on the existing position.

The failure to treat Whittaker's expressed interest as an effective bid consistent with the treatment accorded other employees, and the immediate preparation of the payroll change notice reducing her pay after the March 7 meeting merit the conclusion that Whittaker options were limited to accepting the proffered supervisor's position or suffering a severe pay reduction that would likely force her to quit.[35] Although Respondent probably could not have foreseen Whittaker's ultimate reaction to her pay cut, the fact that the reduction was to a level well below that which she earned when she was initially employed more than 9 years before suffices, in my judgment, to create an intolerable working condition. *Sure Tan, Inc. v. NLRB*, supra; *Norris Concrete Materials*, supra. This is especially true, when as here, Respondent deliberately precluded Whittaker's retention of her existing pay by refusing to consider her for transfer to an existing opening for which she was admittedly well qualified and by presenting her with the ultimatum on March 22 of working at the reduced rate or quitting.

In view of Respondent's previous, albeit less drastic, attempt to preclude Whittaker from participating in the recently concluded organizing campaign by claiming that she was already a supervisor, I find that this record supports the conclusion that Respondent's motive for its postelection actions toward Whittaker was its desire to preclude her from engaging in any further organizing efforts at the Company. As the refusal to consider her bid for a folding machine position and her cut in pay led to the effective termination of her employment on March 21, I find Respondent violated Section 8(a)(1), (3), and (4) of the Act, as alleged.[36]

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by: (a) coercively interrogating employees about their union activities and the activities of other employees; (b) creating the impression that employee union activities were under surveillance; (c) im-

[34] No claim is made that Respondent's reorganization that resulted in the formation of the auxillary department and the creation of the new supervisor's position, which effectively abolished Whittaker's old job, was unlawful. Instead, only the manipulation of Whittaker's options in view of this development are questioned.

[35] Although there may have been some vague reference about employees generally preferring to go up rather than down in the March 5 and 7 meetings with Whittaker, I do not credit the claim that Whittaker was told that her pay would be cut to that of a clasp machine operator or $5.25 per hour in the course of those meetings. Her extreme reaction on March 21 when she learned of the pay cut obviously belies that claim.

[36] In view of this conclusion, I find it unnecessary to address Whittaker's formal termination on October 2.

pressing on employees the futility of engaging in union organizational activities; (d) threatening that it would close its doors if employees selected the Union to represent them; (e) threatening to discharge employees for discussing union matters on worktime when other nonwork-related discussions and activities among employees are permitted on worktime; and (f) telling employees that existing wages and benefits would stop immediately on their selection of a collective-bargaining representative.

4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act by disciplining Erwin Afre and Ernest Garcia under its progressive disciplinary system on December 11 and 14, 1989, respectively.

5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act by laying off Ernest Garcia on December 15, 1989, and by discharging Ethel Whittaker and Erwin Afre on March 21 and October 22, 1990, respectively.

6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

Respondent must immediately offer in writing to reinstate Afre and Garcia to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other benefits. Respondent must also make Afre and Garcia whole for the loss of pay and benefits suffered by reason of the discrimination against them. Backpay, if any, shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions due to any trust fund account on their behalf shall be determined in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

The General Counsel's brief argues that Whittaker should be made whole for the loss of pay and other benefits resulting from her reduction in pay and constructive discharge but does not seek a reinstatement remedy for Whittaker. This record establishes that Whittaker became ill shortly following her constructive discharge. And as discussed above, Whittaker has been found disabled for work by the Social Security Administration and she testified that she was still unable to work. The Social Security determination provides that its finding is reviewable from time to time based on an expectation of recovery.

At the hearing, the General Counsel asserted that there was a causal link between Whittaker's constructive discharge and her subsequent disability. For that reason, the General Counsel suggested that any make-whole remedy in Whittaker's case could involve backpay and trust fund contributions covering a period through to her normal retirement age. Whittaker's medical records in evidence thus far contain complex and detailed technical medical evaluations which, in my judgment, require expert interpretation before any conclusion is made as to whether there is a causal connection between her constructive discharge and her ensuing disability. As that issue is inexorably linked to the appropriate length of the backpay period, that subject is best left to the compliance stage of this proceeding. Any backpay, interest, and trust fund contributions found to be due Whittaker shall be computed as specified above.

Because of the reviewability of Whittaker's Social Security disability determination, I likewise defer the appropriateness of any reinstatement requirement to the compliance stage of the proceedings. Although I recognize that this provisional reinstatement requirement is contrary to the view I expressed on several occasions throughout the hearing, the conclusion now reached is based on a more careful consideration of the actual disability determination by the Social Security Administration.[37] In view of my conclusion above that Respondent's failure to consider Whittaker for an existing position as a folding machine operator was an integral part of the scheme leading to Whittaker's constructive discharge, the recommended Order below provides for reinstatement to a position of that type for which she is qualified if reinstatement is deemed appropriate at all.

Respondent must further expunge from any of its records any reference to the discharge or layoff of Afre, Garcia, and Whittaker, and notify each in writing that such action has been taken and that any evidence related to their particular discharge or layoff will not be considered in any future personnel action affecting each of them. *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, Williamhouse of California, Inc., City of Industry of California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, or discharging employees in order to discourage membership in a labor organization or because they file charges or give testimony under the Act.

(b) Disciplining employees under its progressive disciplinary system in order to discourage membership in a labor organization or because they file charges or give testimony under the Act.

(c) Coercively interrogating employees concerning their union activities and sympathies or the union activities and sympathies of other employees.

(d) Creating the impression that employee union activities are under surveillance.

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[37] The conclusion now reached should not be construed as a conditional determination, however, that Whittaker should be reinstated merely because the Social Security Administration may have later determined that she no longer is disabled under the standards that apply there.

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Impressing on employees the futility of engaging in union organizational activities.

(f) Threatening to close its doors if employees select a collective-bargaining representative.

(g) Threatening to discharge employees for discussing union matters on worktime when other nonwork-related discussions and activities among employees are permitted on work time.

(h) Telling employees that existing wages and benefits would stop immediately on their selection of a collective-bargaining representative.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer to reinstate Erwin Afre and Ernest Garcia, and make them whole for all losses incurred as a result of their discharge or layoff as specified in the remedy section of the administrative law judge's decision.

(b) If deemed appropriate at the compliance stage of this proceeding, offer to reinstate Ethel Whittaker to a position as a folding machine operator for which she is qualified, or to a substantially equivalent position if such a position no longer exists, and make her whole for the losses she incurred as the result of her constructive discharge in the manner specified in the remedy section of the administrative law judge's decision.

(c) Remove from its files any reference to the unlawful discharges or layoffs and notify the employees in writing that this has been done and that the discharges or layoffs will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the propriety of any offers of reinstatement, backpay, and trust fund reimbursements required by the terms of this Order.

(e) Post at its City of Industry, California plant copies of the attached notice marked ''Appendix.''[39] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all complaint allegations not sustained in the administrative law judge's decision in this case be, and the same are, dismissed.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, discharge, or discipline employees in order to discourage membership in Graphic Communications Union, District Council No. 2, Local 388M, Graphic Communications International Union, AFL–CIO, or any other labor organization, or because they file charges or give testimony under the National Labor Relations Act.

WE WILL NOT coercively interrogate employees concerning their union activities and sympathies or the union activities and sympathies of other employees.

WE WILL NOT create the impression that employee union activities are under surveillance.

WE WILL NOT impress on employees the futility of engaging in union organizational activities.

WE WILL NOT threaten to close our doors if employees choose to be represented by the Union.

WE WILL NOT threaten to discharge employees for discussing union matters on worktime when other nonwork-related discussions and activities among employees are permitted on worktime.

WE WILL NOT tell employees that existing wages and benefits will stop immediately on their selection of a collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately offer to reinstate Erwin Afre and Ernest Garcia and WE WILL make them, along with Ethel Whittaker whole, with interest, for all losses incurred as a result of their discharge or layoff.

WE WILL, if it is determined appropriate at a later date, offer to reinstate Ethel Whittaker as a folding machine operator.

WE WILL notify Erwin Afre, Ernest Garcia, and Ethel Whittaker that we have removed from our files any reference to their discharge or layoff and that the discharge or layoff will not be used against them in any way.

WILLIAMHOUSE OF CALIFORNIA, INC.